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Supreme Court of

OCTOBER

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COUNTY OF ORANG

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TERM, 1986

VINE, *Petitioner,*

et al., Respondents.

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OURT OF APPEALS
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IEL, JACOBS & ELLSWORTH
wenty-Fifth Floor
301 Century Park East
os Angeles, California 90067
elephone: (213) 556-2000

n E. McDermott,
ounsel of Record
resa M. Marchlewski
ph E. Thomas
N. Sorrell

Attorneys for Petitioner

30PP

QUESTION PRESENTED

Whether the Ninth Circuit erred in ruling that the petitioner City of Irvine's Motion to Intervene in this case was untimely when the Motion was filed one month after Irvine learned that its interests were no longer represented herein and nearly three months before the proposed settlement of the case was submitted to the District Court.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, City of Irvine ("Irvine"), and the Respondents, County of Orange ("County"), Air California, American Airlines, America West Airlines, Continental Airlines, Inc., Frontier Airlines, Inc., Jet America, Pacific Southwest Airlines, Republic Airlines, Inc., Western Airlines, Inc., Alaska Airlines, Inc., Muse Air Corporation, Trans World Airlines, Inc., United Airlines, Inc., Federal Aviation Administration ("FAA"), McDonnell Douglas Corporation, City of Newport Beach ("Newport"), Stop Polluting Our Newport Corporation ("SPON"), and Airport Working Group of Orange County, Inc. ("AWG").

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF IRVINE,

Petitioner,

v.

COUNTY OF ORANGE,
AIR CALIFORNIA, AMERICAN AIRLINES,
AMERICA WEST AIRLINES, CONTINENTAL AIRLINES, INC.,
FRONTIER AIRLINES, INC., JET AMERICA,
PACIFIC SOUTHWEST AIRLINES, REPUBLIC AIRLINES, INC.,
WESTERN AIRLINES, INC., ALASKA AIRLINES, INC.,
MUSE AIR CORPORATION, TRANS WORLD AIRLINES, INC.,
UNITED AIRLINES, INC., FEDERAL AVIATION ADMINISTRATION,
MCDONNELL DOUGLAS CORPORATION,
CITY OF NEWPORT BEACH,
STOP POLLUTING OUR NEWPORT CORPORATION,
AIRPORT WORKING GROUP OF ORANGE COUNTY, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The City of Irvine, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 9, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the decision of the District Court is reported at 799 F.2d 535 (9th Cir. 1986). The United States District Court for the Central District of California (Hatter, D.J.) denied the City of Irvine's motion to intervene on October 21, 1985.

JURISDICTION

Invoking federal jursidiction under 28 U.S.C. Section 1331 and 28 U.S.C. Section 1337, the petitioner brought this suit in the Central District of California. The respondent County of Orange also invoked the pendent and ancillary jurisdiction of the District Court with respect to related state law claims under the California Environmental Quality Act (Public Resources Code §§ 21000 *et seq.*) and the implementing California State CEQA regulations and guidelines (14 Cal. Admin. Code §§ 15000 *et seq.*).

Petitioner invoked the jurisdiction of the Court of Appeals for the Ninth Circuit under 28 U.S.C. Section 1291. The Ninth Circuit's opinion affirming the Central District's decision was filed on September 9, 1986. Petitioner's petition for rehearing in the Ninth Circuit was denied on or about November 4, 1986.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Fed. R. Civ. Proc., Rule 24, states as follows:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . .

> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application, anyone may be permitted to intervene in an action. . . .

> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. . . .

In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

STATEMENT OF THE CASE

I.

JURISDICTION AND THE DISPOSITION BELOW

Jurisdiction of the District Court was invoked under 28 U.S.C. Section 1331 based upon a civil action arising under the Constitution and the laws of the United States and under 28 U.S.C. Section 1337 because the action arose under acts of Congress regulating commerce.

In addition thereto, respondent, County, invoked the pendent and ancillary jurisdiction of the District Court with respect to related state law claims under the California Environmental Quality Act (Public Resources Code Sections 21000 *et seq.*), and the implementing California State CEQA regulations and guidelines, 14 Cal. Admin. Code Sections 15000 *et seq.* (the "Guidelines").

The County also invoked the District Court's ancillary jurisdiction over the aforementioned state law claims because they are related to and affected by the federal issues in the Complaint.

II.

STATEMENT OF FACTS

The County is the proprietor of John Wayne Airport ("JWA"), the only commercial air carrier airport in Orange County. (CR 1, pp. 1, 8; CR 7, pp. 1, 8; AER, pp. 2, 9, 34, 41.)

On February 26, 1985, the County approved and adopted the Airport Project, its plan for the future development of commercial airline activity at JWA. Among other things, the Airport Project proposed limitations on the number and type of commercial jet aircraft which could utilize JWA, limitations on the maximum number of commercial aircraft passengers utilizing the airport, and a square footage limitation on JWA's terminal size. Significantly, the Airport Project did not address or alter the County's historic opposition to commercial use of the El Toro Marine Corps Air Station ("El Toro MCAS"), which is located southeast of JWA, adjacent to Irvine. (CR 125, p. 2; AER, p. 80.)

Petitioner, Irvine, is bordered to the south and east by the El Toro MCAS. Since approximately 1942, El Toro MCAS has been, and continues to be, operated solely as a military air base. Until recently, the County has continually expressed its opposi-

tion to utilization of El Toro MCAS for anything other than a military air base, and such utilization of the El Toro MCAS was neither proposed nor discussed.

In fact, prior to adoption of the Airport Project, the County was on record, via resolutions of its Board of Supervisors and the adoption of its General Plan, as opposing any commercial use of El Toro MCAS. Both Irvine's and the County's General Plan recognize El Toro MCAS as being within Irvine's "sphere of influence." (CR 125, p. 26; AER, p. 104.)

Both Irvine's and the County's vehement opposition to any civilian use of El Toro MCAS was well acknowledged and recognized via County Resolutions. On or about October 12, 1982, the County had adopted Resolution No. 82-1542 which, among other things, recognized that: (a) planning and development of land uses and infrastructure facilities surrounding El Toro MCAS assumed continued military use; (b) the establishment of a commercial airport at El Toro MCAS would cause severe environmental impacts on South Orange County and Irvine; and (c) joint civilian and military use of El Toro MCAS would require existing residential neighborhoods to be converted to other land uses. (CR 125, p. 26; AER, p. 104.)

County Resolution No. 82-1542 also reaffirmed the County's historic opposition to commercial airline use of El Toro MCAS, which opposition had previously been expressed by way of Resolution No. 80-215 dated February 6, 1980, and reassured Irvine and its residents of the County's long-standing and abiding commitment to oppose joint civilian and military use of El Toro MCAS. (CR 125, p. 26; AER, p. 104.)

Consistent with Resolution No. 82-1542, Irvine's General Plan assumed that El Toro MCAS would continue as military use only. Specifically, Irvine's land use element, which includes within its parameters the unincorporated area adjacent to El Toro MCAS, as well as the areas currently within the City of Irvine bordering the military air base, and the noise elements of the General Plan, rely heavily upon this assumption. (CR 125,

pp. 26-27; AER, pp. 104-105.) The General Plan of Orange County also assumes that El Toro MCAS would remain in government use throughout the period of the Plan (the year 2005).

Prior to adoption of the Airport Project, and pursuant to the requirements of the California Environmental Quality Act (California Public Resources Code Section 21000, *et seq.*) and the National Environmental Policy Act (42 U.S.C. Section 4321, *et seq.*), a study was prepared by the County and Federal Aviation Administration concerning the proposed environmental effects of the Airport Project. This study has been designated by the County as Environmental Impact Report 508 and Environmental Impact Statement 508 (hereinafter referred to as "EIR 508/EIS"). (CR 1, pp. 14-17; CR 7, pp. 14-17; AER, pp. 15-18, 47-50.)

After adopting the Airport Project, and in anticipation of various legal actions which would be taken against the County challenging the Project and adequacy of EIR 508/EIS, the County, on March 6, 1985, filed this action naming as defendants various airlines, community groups and others which the County recognized to be interested in the resolution of the proposed Airport Project. This action sought, among other things, a declaratory judgment as to the lawfulness and adequacy of the Airport Project and the studies relied upon for its implementation. (CR 1, pp. 27-29; CR 7, pp. 28-41; AER, pp. 28-30, 61-64.)

Also named as defendants were "Doe Defendants 1 through 1,000," alleged by the County to be "persons interested in the subject matter of this action, in whole or in part, and who take positions in respect of one or more of the controversies alleged in this complaint contrary and adverse to the positions of the plaintiff." (CR1, pp. 7-8; CR7, p. 8; AER, pp. 8-9, 41.)

At the inception of this litigation, the Airport Project and lawsuit focused exclusively on the proposed expansion of JWA, and the caps and limitations which the County sought to impose

on the air carrier use of JWA. Although JWA is located in unincorporated County territory adjacent to the City of Irvine, the County did not join Irvine as a defendant.

The County expressly alleged that the action was brought "to afford all interested and affected parties an opportunity to litigate their respective and related claims in a single forum." (CR 1, p. 1; CR 7, p. 2; AER, pp. 2, 35.) In so doing, the County named as defendants the FAA, various airlines who currently serve, or have expressed an interest in serving, travelers utilizing JWA, Newport, located adjacent to JWA, groups purporting to represent citizens residing in Newport, and various organizations generally opposed to any increase in operations at JWA, and a corporation engaging in the manufacture and sale of commercial aircraft. (CR 1, pp. 3-7; CR 7, pp. 3-8; AER, pp. 3-8, 36-41.)

At the time the County filed its complaint, Irvine, as a municipality contiguous to JWA, had an interest in promoting and protecting certain of the issues raised therein. Because the litigation and underlying EIR 508/EIS were solely involved with the proposed expansion and limitations on air carrier traffic at JWA, Irvine's interests were adequately represented by certain of the parties named as defendants, including Newport, the FAA and citizens groups.

On or about August 20, 1985, Irvine first became aware of the existence of a settlement proposed by certain parties to this litigation (the "Settlement Agreement"). (CR 125, p. 27; AER, p. 105.) The Settlement Agreement contemplates both military and civilian use of El Toro MCAS, which joint use would have a significant and adverse impact on the planning, development and environment of the City of Irvine. (CR 125, p. 26; AER, p. 104.)

The terms of the Stipulated Judgment[1] dramatically alter the scope of the Airport Project, the County's position with respect to the commercial use of El Toro MCAS, and the position of the settling defendants with respect to the adequacy of EIR 508/EIS.

Specifically, the terms of the Settlement: (a) more severely restrict the growth of JWA from that set forth in the Airport Project; (b) recognize that JWA will not satisfy the demand for air travel in Orange County with the limitations set forth in the Airport Project and the Settlement: (c) recognize that in consideration for the settling parties' execution of the Settlement, the County would implement Resolution No. 85-1231, which rescinded the County's opposition to commercial use of El Toro MCAS; (d) impose a duty on the County to cooperate with third parties seeking assistance in obtaining federal funds in establishing other commercial airport operations in Orange County; (e) terminate the ability of the settling defendants to litigate the adequacy of EIR 508/EIS as it relates to the Airport Project and the amendments to the Airport Project resulting from the Proposed Settlement; and (f) require that a judgment be entered by the Court establishing the adequacy of EIR 508/EIS with respect to the Airport Project, and the amendments thereto resulting from the Settlement. (CR 175; AER, pp. 504-526.)

As a result of the Settlement and Resolution No. 85-1231, the County will now sanction, assist and promote the development of El Toro MCAS as a commercial airport. The Settlement, by way of the Stipulated Judgment, will, without Irvine's intervention, forever bar Irvine or any other party from attacking the adequacy of the EIR 508/EIS or the Airport

[1] The Settlement was first filed with the District Court on December 13, 1985, approximately seven weeks after Irvine's Motion For Leave to Intervene was denied by the trial court. (CR 175; AER, pp. 504-526.) The District Court entered the "Stipulation for Entry of Judgment by Certain Settling Parties" on December 13, 1985. (CR 176; AER, pp. 527-530.)

Project. Not only has the potential impact of the Airport Project on Irvine substantially increased, but no party remains to protect or represent Irvine's interest in challenging the adequacy of EIR 508/EIS.

On September 20, 1985, months before the Settlement Agreement was submitted for court approval, Irvine filed its Motion For Leave To Intervene pursuant to Fed. R. Civ. P. 24(a) and (b). (CR 126; AER, pp. 70-76.) The motion was opposed by defendants Newport, SPON, AWG, Pacific Southwest Airlines, and America West Airlines. (CR 140, 141, and 143; AER, pp. 252-333, 334-383, 384-390; CR 149; AER, pp. 398-406.)

Prior to being apprised of the proposed Settlement Agreement, Irvine's interests were being represented adequately by other parties herein. Until it became cognizant of the proposed Settlement Agreement, Irvine had no compelling reason to intervene in the within action. Recognizing its status as the municipal entity to be most affected by the proposed Settlement Agreement, Irvine promptly moved to intervene so as to adequately protect its rights and interests. Irvine's motion was argued on October 21, 1985, and the District Court entered its final order denying the application to intervene on October 28, 1985. (CR 153, 154; AER, pp. 435-441, 442-443.)

On December 13, 1985, nearly three months after Irvine filed its motion, the proposed Settlement was finally submitted to the District Court in the form of a "Stipulation for Entry of Judgment by Certain Settling Parties." (CR 175; AER, pp. 504-526.) On December 13, 1985, the District Court entered a judgment in accordance with the Stipulation. (CR 176; AER, pp. 527-530.) The Ninth Circuit affirmed on September 9, 1986. Petitioner's petition for rehearing in the Ninth Circuit was denied on or about November 4, 1986.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW THAT IRVINE'S MOTION TO INTERVENE WAS UNTIMELY RAISES IMPORTANT AND UNRESOLVED FEDERAL PROBLEMS.

The Ninth Circuit held below that Irvine's motion for intervention as a matter of right and permissively was untimely, thereby affirming the decision of the District Court denying the motion. This raises serious, special and important federal issues with respect to the statutory construction and application of Fed. R. Civ. Proc., Rule 24, the federal intervention statute, which should be resolved by this Court.

U.S. Sup. Ct. Rule 17, 28 U.S.C.A. recognizes this Court's power of supervision over the federal Courts of Appeals. This power of supervision has been exercised to review the construction and application of various of the federal rules of civil procedure. *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L.Ed. 451 (1947) ("Case present[ing] an important problem under Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c"); *Schlagenhauf v. Holder*, 379 U.S. 104, 109, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964) ("case involv[ing] the validity and construction of Rule 35(a) of the Federal Rules of Civil Procedure as applied to the examination of a defendant in a negligence action").

The instant matter involves a major dispute with respect to the timeliness of Irvine's motion to intervene pursuant to Fed. R. Civ. Proc., Rule 24. In essence, Irvine contends that the District Court and the Ninth Circuit erroneously interpreted and applied Fed. R. Civ. Proc., Rule 24, in ruling that Irvine's Motion to Intervene in this case was untimely although it was filed one month after the existence of the Settlement Agreement, and nearly three months before the Settlement Agreement was submitted to the District Court in the form of the

Stipulation. Since the determination of the proper construction and application of a federal rule of civil procedure is involved, this Court may exercise its supervisory powers over the decisions below thereon. Further, as will be shown hereinafter, the decisions of the District Court and the Ninth Circuit were erroneous. Therefore, this Court should exercise its powers to review the instant matter through the issuance of a writ of certiorari.

In addition, this Court should exercise its power of review by issuing a writ of certiorari because the construction and application of Fed. R. Civ. Proc., Rule 24, herein will affect the disposition of public lands. In *United States v. Coleman*, 390 U.S. 599, 88 S. Ct. 1327, 20 L.Ed.2d 170 (1968), this Court granted certiorari to determine whether certain quartzite deposits upon public lands for which the respondent had applied for a patent based on his entry onto and exploration of said lands constituted a "common variety" of stone under 30 U.S.C. Section 611. This Court stated that it "granted the Government's petition for a writ of certiorari because of the importance of the decision to the utilization of public lands." *Id.* at p. 601. *See also, Andrus v. Utah*, 446 U.S. 500, 506, 100 S. Ct. 1803, 64 L.Ed.2d 458 (1980) (certiorari granted to resolve "a significant issue regarding the disposition of vast amounts of public land").

Similarly, this matter involves the disposition of federal lands, namely, the El Toro MCAS. Therefore, the ultimate determination of the issue of Irvine's timeliness under Fed. R. Civ. Proc., Rule 24, necessarily will have a strategic impact on the utilization of those public lands. Consequently, Irvine respectfully requests that the Court grant this petition for a writ of certiorari.

The need for review by this Court on a writ of certiorari is augmented by the sheer importance of the disposition of this case not only to the parties in particular, but to Southern California generally. Because of Irvine's proximity to JWA and

to El Toro MCAS and the obvious environmental interests impacted by the proposed future growth of JWA and El Toro MCAS contemplated under the proposed Settlement of the case into which Irvine seeks to intervene, Irvine's interest in a proper determination of its right to intervene is substantial and indisputable. Moreover, as stated above, Irvine's land use element, as well as the noise elements of Irvine's General Plan, rely heavily on the assumption that El Toro MCAS would continue as military use only. An erroneous decision below would thus affect, at the very least, those members of the Irvine and South Orange County communities who have relied on these elements and/or on the County's historic opposition to commercial use of El Toro MCAS.

It is beyond dispute that Irvine has a substantial interest in the remedial scheme envisioned by the proposed Settlement. This interest is prejudiced by the potential *stare decisis* impact which the Stipulated Judgment and Settlement will have upon Irvine. In a similar case, *United States v. Stringfellow, et al.*, 783 F.2d 821 (9th Cir. 1986), the intervenor ("CNA") appealed a denial of its motion to intervene under Fed. R. Civ. Proc. 24(a). CNA had filed its motion to intervene approximately three months after the complaint had been filed. The trial court's denial of intervention under Fed. R. Civ. Proc., Rule 24(a) was reversed on appeal because of the "substantial interest" the intervenor established in the contemplated settlement and remedial scheme.

On appeal, the Ninth Circuit found that the mere potential *stare decisis* impact of the litigation could, as a practical matter, result in the intervenor being precluded from litigating several of its claims against other parties to the action. The *Stringfellow* court also determined that the ultimate disposition or settlement of the litigation would establish a remedial scheme, in which CNA had a palpable interest. Thus, the Ninth Circuit stated as follows:

> "The disposition of the present litigation will, as a practical matter establish the applicable remedial

> scheme. CNA has a palpable interest in that scheme. Where, as here, a prospective intervenor has demonstrated a clear interest in the remedial scheme, and where the prospective intervenor seeks to obtain remedies that differ from those sought by the original plaintiffs, it is reasonable to conclude that disposition of the litigation may impair the prospective intervenor's ability to protect its interest. That the remedy established in the present litigation may be challenged in a subsequent action does not detract from our conclusion . . .
>
> "Because of the possible *stare decisis* effect of this litigation and because of CNA's palpable interest in the remedial scheme, we hold that CNA has adequately demonstrated that the disposition of the litigation may, as a practical matter, impair its ability to protect its interests." (*Id.*, at p. 827.)

As in *Stringfellow*, Irvine, because denied intervention, was not able to participate in the remedial scheme envisioned by the proposed Settlement. Irvine's interests clearly differed from those of the parties to the Settlement in that Irvine contests the adequacy of the EIR 508/EIS statements. The remaining non-settling defendants have not—and cannot—maintain any claims with respect to the environmental impact reports. As a result of the Settlement, Irvine's interests in the environmental impact have not been addressed, much less protected.

Finally, the Stipulated Judgment indeed has a *stare decisis* impact on Irvine in that Irvine will be bound by the adequacy of the disputed environmental impact statements. No party remains in this case who has standing to dispute the environmental impact reports. Moreover, the applicable limitation period has expired, thereby barring Irvine and any other party from bringing a separate action to litigate the adequacy of said reports. Because of the importance of the disposition of

this case to Irvine and the communities in Southern California generally, the Court should grant this Petition and review the instant matter.

This Court has found "special and important reasons," thereby granting a petition for a writ of certiorari, where many individuals are involved or are affected by the decision below. *Patterson v. Lamb*, 329 U.S. 539, 67 S. Ct. 448, 91 L.Ed. 485 (1947); *Federal Trade Commission v. Jantzen, Inc.*, 386 U.S. 228, 229, 87 S. Ct. 998, 999, 18 L.Ed.2d 11, 13 (1967); *United Steelworkers v. Usery*, 429 U.S. 305, 307, 97 S. Ct. 611, 613, 50 L.Ed.2d 502, 506 (1977).

As shown above, the impact of the decision with respect to the timeliness of Irvine's motion to intervene will have a severe impact on, at the very least, the South Orange County area population of California. In light of the significant impact which the disposition of this case will have upon numerous entities and individuals not previously represented herein, this Court should grant Irvine's petition for a writ of certiorari and review the decision of the Ninth Circuit.

This Court also has granted petitions for a writ of certiorari where especially large amounts of money are involved in litigation over the issue of statutory construction. *See, United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2950, 77 L.Ed.2d 580, 211, n.7 (1983); *Commissioner v. Standard Life & Accident Insurance Company*, 433 U.S. 148, 77 S. Ct. 2523, 53 L.Ed.2d 653 (1977); *Alaska v. American Can Co.*, 358 U.S. 224, 79 S. Ct. 274, 3 L.Ed.2d 257 (1959); *Andrus v. Utah, supra*, at U.S. 506.

As stated, the determination of this case will have a significant fiscal impact upon not only the Petitioner and the Respondents, but upon other members of the South Orange County community who have chosen to rely on the County's historic opposition to commercial use of El Toro MCAS. The case also raises significant questions pertaining to the proper interpretation and application of the timeliness requirement of

the federal intervention statute upon which this Court should provide guidance. Finally, as will be shown hereinafter, the decision below conflicts with decisions of other circuits and was erroneous and inequitable.

II.

THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO THE TIMELINESS REQUIREMENTS ON A MOTION TO INTERVENE.

U.S. Sup. Ct. Rule 17, 28 U.S.C.A., which sets forth considerations governing review on certiorari, states that one reason that will be considered in determining whether to grant review on writ of certiorari is whether "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . ." *See also, Bingler v. Johnson*, 394 U.S. 741, 59 S. Ct. 1439, 22 L.Ed.2d 695 (1969); *U.S. v. O'Malley*, 383 U.S. 627, 86 S. Ct. 1123, 16 L.Ed.2d 145 (1966). As shown below, such a conflict exists with respect to the requirement of timeliness in filing a motion to intervene under Fed. R. Civ. Proc., Rule 24, the federal intervention statute. Therefore, this Court should grant Irvine's petition for a writ of certiorari to harmonize the decisions of the various circuit courts.

As shown hereinafter, the Ninth Circuit test for determining timeliness is set forth in *United States v. State of Oregon*, 745 F.2d 550 (9th Cir. 1984). In *Oregon*, the Ninth Circuit stated that timeliness is determined by considering three factors: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the reason for and length of the delay. (*Id.*, at p. 552.)

On the other hand, the test for determining timeliness of a motion to intervene utilized in other circuits is quite different

than the Ninth Circuit test set forth above. For example, the Eleventh Circuit test, as articulated in *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983), is as follows:

> "A district court must consider four factors in assessing timeliness, namely (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely." (*Id.*, at p. 1516.)

Thus, a clear conflict exists between the test for determining the timeliness of a motion to intervene utilized in the Ninth Circuit and the timeliness test utilized by the Eleventh Circuit. Specifically, the Ninth Circuit timeliness test fails to consider in any manner the third factor set forth in the Eleventh Circuit test: the extent of prejudice to the would-be intervenor if his petition is denied.

Not only is the Ninth Circuit test for determining the timeliness of a motion to intervene in conflict with the decisions of the Eleventh Circuit, it is in conflict with the decisions of other circuits. *See, United Nuclear Corp. v. Cannon*, 696 F.2d 141 (1st Cir. 1982), *Culbreath v. Dukakis*, 630 F.2d 15, 20-25 (1st Cir. 1980) (First Circuit test uses same factors utilized by the Eleventh Circuit); *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977) (Fifth Circuit test uses same factors utilized by the Eleventh Circuit).

As shown above, the denial of Irvine's motion to intervene will severely prejudice Irvine and its citizens. As stated, Irvine's General Plan and land use element assumed that El Toro

MCAS would continue as military use only. Consequently, future planning and development of Irvine will be severely affected by the disposition of Irvine's motion to intervene. Moreover, because El Toro MCAS is adjacent to Irvine and is within Irvine's sphere of influence, denial of Irvine's motion raises serious questions about the ability of Irvine to participate in democratic self-planning.

Since Irvine will suffer great prejudice if its petition is denied, the determination of the timeliness of its motion to intervene would have been different under the timeliness test utilized by other circuits. Thus, this Court is presented with a conflict between circuits with respect to the factors considered in determining the timeliness of a motion to intervene. Therefore, this Court should exercise its discretion and review this matter upon writ of certiorari.

III.

THE DECISION BELOW THAT IRVINE'S MOTION TO INTERVENE WAS UNTIMELY WAS ERRONEOUS AND INEQUITABLE.

The Ninth Circuit's finding that Irvine failed to intervene on a timely basis was clearly erroneous and an abuse of discretion insofar as the Ninth Circuit clearly ignored the changed circumstances established by Irvine in the District Court and apposite case authority affirmatively establishing that Irvine's motion was timely.

In determining whether a motion for intervention is timely, the Court must look to "all of the circumstances." *NAACP v. New York*, 413 U.S. 345, 93 S. Ct. 2591, 37 L.Ed.2d 648 (1973). In analyzing the timeliness element, the most relevant circumstance "is when the intervenor became aware that its interest would no longer be protected adequately by the parties." *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 8 (9th Cir. 1980), citing *United Airlines, Inc. v.*

McDonald, 432 U.S. 385, 97 S. Ct. 2464, 53 L.Ed.2d 423 (1977). As will be demonstrated herein, under the Ninth Circuit's decisions, Irvine's motion was timely, as it was made immediately after it discovered that "its interest would no longer be protected adequately by the parties."

The critical circumstance for determining timeliness in the instant case is that on about August 20, 1985, Irvine first became aware of the possibility of Settlement. (CR 125, p. 27; AER, p. 105.)

Prior to this date, Irvine's only interest in this litigation was having the District Court take note of the affirmative defenses and/or claims concerning the County's request for a declaratory judgment as to the adequacy of EIR 508/EIS, and its right to implement the Airport Project. Irvine's interests were, however, adequately represented by other parties herein, namely, Newport, the FAA and the citizens groups.

Indeed, prior to publication of articles concerning the proposed Settlement in the local media, it would have been sheer speculation for Irvine to assume that any settlement terms would be acceptable to all the parties, or harmful to Irvine, much less divine the specific settlement terms through oblique and often inaccurate newspaper accounts of the "settlement discussions."

Even under the Ninth Circuit's test for "timeliness," Irvine's application should have been granted. The pendency of the proposed Settlement clearly constituted a changed circumstance, insofar as it opened up the possibility of new and expanded negotiations regarding the utilization of El Toro MCAS as an alternative to JWA. Prior to that date, the Airport Project litigation, for all practical purposes, merely involved proposals relating to JWA. By injecting into the proposed Settlement terms that directly impacted on the utilization of the El Toro MCAS (within the City of Irvine's sphere of influence) and proposed expansion of air operations at the air base, the settling parties, at the eleventh hour, themselves transformed the nature and character of the Airport Project litigation.

Neither the settling parties nor the District Court could conceivably have expected Irvine to anticipate such a rapid turn of events at the outset of the Airport Project litigation. Irvine filed its Motion to Intervene approximately one month after it learned of the proposed Settlement and the proposed terms thereof that directly impacted on the utilization of the El Toro MCAS. In order for Irvine's motion to have been timely under the decisions of the District Court and the Ninth Circuit below, it would have been incumbent upon Irvine to know the unknowable in advance, *i.e.*, that the parties to this action had proposed settlement terms that affected the utilization of El Toro MCAS. As Irvine sought leave to intervene shortly after being apprised of these changed circumstances, Irvine's motion was timely.

The test for determining whether a motion for intervention is timely is set forth in *Legal Aid Society of Alameda County v. Dunlop,* 618 f.2d 48 (9th Cir. 1980), wherein the court held:

> "[T]he relevant circumstances here for determining timeliness is when the intervenor became aware that its interests would no longer be protected adequately by the parties: this was the precise issue decided in *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394, 97 S. Ct. 2464, 2469, 53 L.Ed.2d 423 (1977)." *Id.*, at p. 50.

In *McDonald,* the Supreme Court ruled that a party who had been a member of a plaintiff class was entitled to intervene to appeal the District Court's ruling striking the complaint's class allegations, which ruling was made some four years earlier. Intervention was allowed because the intervenor learned only at that late date that the remaining defendants would not bring an appeal upon final resolution of the matter in the District Court.

In permitting intervention, this Court expressly found that the critical factor in determining timeliness was the point in time the would-be intervenor learned its interests were no

longer being adequately protected by the parties to the action. Thus, the Supreme Court set a standard recognized by the Ninth Circuit in *Dunlop*, requiring that the timeliness of a motion for intervention be considered from the point in time at which the intervenor's interests were no longer adequately represented.

Further, in analyzing the timeliness requirement, a court must consider when the applicant could have intervened, and weigh the lapse of time in light of the circumstances of the case. As stated by a federal commentator:

> "In the exercise of its discretion the court of course will consider the time element itself but this should not be judged in a vacuum. The requirement of timeliness is not a means of punishment for the dilatory and the mere lapse of time by itself does not make an application untimely. The court must consider whether the applicant was in a position to seek intervention at an earlier stage in the case and must weigh the lapse of time in the light of all the circumstances of the case." 7A C. Wright and A. Miller, *Federal Practice and Procedure*. § 1916 at p. 574 (1972). *See also, United States v. State of Oregon*, 745 F.2d 550 (9th Cir. 1984).

Petitioner submits that the case of *United States v. State of Oregon, supra*, is dispositive on this issue.

In *Oregon*, the State of Idaho moved for leave to intervene to participate in negotiations for a modified management plan relating to intra-state fishing rights in the Columbia River and its tributaries. The motion for leave to intervene was filed *fifteen* years after the commencement of litigation, and six years after all parties to the litigation signed a plan to manage the fisheries which was subsequently approved by the District Court.

Approximately six years thereafter, when it became apparent that certain of the signatories to the management plan were

withdrawing and the plan would be renegotiated, Idaho moved for leave to intervene, citing changed circumstances. The District Court denied the motion, claiming that Idaho had failed to meet the timeliness requirement of Fed. R. Civ. P. 24(a)(2).

In reversing the decision, the Ninth Circuit noted:

> "In determining timeliness, this court has stated that it looks to three factors: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the reason for and length of the delay. [Citations omitted.] Mere lapse of time alone is not determinative. [Citation omitted.] Idaho gives changed circumstances—the possibility of new and expanded negotiations—as a major reason for its attempted intervention at this time. This change of circumstance, which suggests that the litigation is entering a new stage, indicates that the stage of the proceeding and reason for delay are factors which militate in favor of granting the application. [Citations omitted.]." (*Id.*, at p. 552.)

The Ninth Circuit's rationale in *Oregon* is equally persuasive herein. Because the terms of the settlement and resolutions contemplated therein clearly constituted a changed circumstance and a new stage of the litigation, Irvine's request to intervene was timely and should have been so recognized by the District Court and the Ninth Circuit.

The District Court's finding that Irvine's intervention would prejudice the settling parties (RT, p. 41; AER, p. 488), which was affirmed by the Ninth Circuit, also clearly constituted an abuse of discretion and was unsupported by the record. It was not until September 6, 1985 that the settling parties affixed their signatures to the "Stipulation for Entry of Final Judgment By Settling Parties." More significantly, the Settlement Agreement had not even been submitted for court approval at the time the motion was argued. (CR 125; CR 175;

CR 176; AER, pp. 142, 504-526, 527-530.) Thus, any delay between the time Irvine first learned of the proposed settlement and the time it filed the instant motion—approximately four weeks—did not cause any palpable prejudice to the parties herein. Indeed, at the time the motion was argued, respondents' conclusory claims of prejudice were wholly unsupported by any facts.

Nor was the District Court, or the Ninth Circuit affirmance thereof, correct in premising its ruling on the claim that the mere potential unraveling of the then-proposed settlement warranted denying Irvine's motion. (RT, pp. 41-42; AER, pp. 488-489.)

In so ruling, the District Court and the Ninth Circuit obviously ignored the fact that any "prejudice" to be suffered by the settling parties was the product of their own desire to forge a settlement agreement which severely impeded and impinged upon the rights of an adjacent community which was not a party to the litigation.

To allow the settling defendants to base key portions of their agreement on terms and conditions affecting a third party such as Irvine, then allow the same to claim "prejudice" when that very party seeks to inject itself into the settlement process, is inherently inequitable.

In attempting to intervene, Irvine was merely seeking to protect its own interests and the interests of its citizens. Given the City of Irvine's legitimate interest in the proposed settlement, Irvine should have been afforded the opportunity to participate in the negotiation and discussion of said agreement on the same basis as the settling parties. (See generally, *United States v. State of Oregon, supra*, 745 F.2d at p. 553.)

Based on the foregoing, Irvine submits that it has adequately demonstrated that its motion to intervene was timely, and that the decisions of the District Court and the Ninth Circuit were erroneous and inequitable.

CONCLUSION

As shown above, there are special and important reasons for this Court to grant this Petition for Certiorari. The decision of the Ninth Circuit was erroneous and the timeliness test utilized by the Ninth Circuit is not in harmony with the test utilized by other circuits. For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

MEMEL, JACOBS & ELLSWORTH
25th Floor
1801 Century Park East
Los Angeles, California 90067
(213) 556-2000
JOHN E. MCDERMOTT
(Counsel of Record)
THERESA M. MARCHLEWSKI
JOSEPH E. THOMAS
PAUL N. SORRELL
Attorneys for Petitioner

Dated: January 30, 1987

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF IRVINE,

Petitioner,

vs.

COUNTY OF ORANGE, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMEL, JACOBS & ELLSWORTH
Twenty-Fifth Floor
1801 Century Park East
Los Angeles, California 90067
Telephone: (213) 556-2000

JOHN E. McDERMOTT,
Counsel of Record
THERESA M. MARCHLEWSKI
JOSEPH E. THOMAS
PAUL N. SORRELL

Attorneys for Petitioner

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED

OCT 28 1985

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

No. CV 85-1542 TJH (Mcx)

COUNTY OF ORANGE,
Plaintiff,

v.

AIR CALIFORNIA, et al.,
Defendants.

AND RELATED ACTIONS.

ORDER

The City of Irvine's Motion to Intervene, came on for hearing on October 21, 1985, the Honorable Terry J. Hatter, Jr., presiding. The Court, having considered the parties' briefs and having heard arguments by counsel,

ORDERS that:

City of Irvine's Motion to Intervene pursuant to Federal Rules of Civil Procedure 24(a) and (b) is denied.

DATED: 1/27, 1985 s/s TERRY J. HATTER, JR.
Honorable Terry J. Hatter, Jr.
United States District Judge

Presented by:

O'DONNELL & GORDON
PIERCE O'DONNELL*
STEVEN F. PFLAUM
JOSEPHINE E. POWE

*A Professional Corporation

ROBERT H. BURHAM, City Attorney

By s/s JOSEPHINE E. POWE DATED: October 23, 1985

JOSEPHINE E. POWE
Attorneys for Defendant and
Counterclaimant CITY OF
NEWPORT BEACH

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 9 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 85-6501
D.C. NO. CV 85-1542-TJH

COUNTY OF ORANGE,
Plaintiff-Appellee,
v.

AIR CALIFORNIA; AMERICAN AIRLINES; AMERICA WEST AIRLINES; CONTINENTAL AIRLINES INC.; FRONTIER AIRLINES, INC.; JET AMERICA; PACIFIC SOUTHWEST AIRLINES; REPUBLIC AIRLINES, INC.; WESTERN AIRLINES, INC.; ALASKA AIRLINES, INC.; MUSE AIR CORPORATION; TRANS WORLD AIRLINES, INC; UNITED AIRLINES INC.; FEDERAL AVIATION ADMINISTRATION; McDONNELL-DOUGLAS CORPORATION; CITY OF NEWPORT BEACH; STOP POLLUTING OUR NEWPORT CORPORATION; AIRPORT WORKING GROUP OF ORANGE COUNTY, INC.,
Defendants-Appellees.

CITY OF IRVINE,
Applicant for Intervention-Appellant.

Appeal from the United States District Court
for the Central District of California
The Honorable Terry J. Hatter,
District Judge, Presiding
Argued: July 8, 1986 - Pasadena, California
Submitted July 29, 1986

OPINION

Before: ANDERSON, POOLE, and THOMPSON, Circuit Judges.

ANDERSON, Circuit Judge:

The City of Irvine (Irvine) appeals from a district court order denying a motion to intervene as a matter of right, Fed. R. Civ. P. 24(a)(2), and denying a motion to intervene permissively, Fed. R. Civ. P. 24(b)(2). We affirm.

I. FACTS

On February 26, 1985, the County of Orange (Orange County) approved and adopted a plan (the Airport Project Plan) for the future development of commercial airline activity at John Wayne Airport (JWA). Prior to adoption of the Airport Project Plan, and pursuant to the requirements of the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), a study was prepared by Orange County and the Federal Aviation Administration concerning the proposed environmental effects of the Airport Project Plan (this study is hereinafter referred to as EIR 508/EIS). Orange County certified that EIR 508/EIS was legally adequate under CEQA.

Due to the fact that there was interrelated litigation pending before both state and federal courts challenging the Airport Project Plan and the adequacy of EIR 508/EIS, Orange County filed an action seeking a declaratory judgment as to the lawfulness and adequacy of the Airport Project Plan and EIR 508/EIS and requesting the court to enjoin the City of Newport Beach and others from litigating the CEQA issues in state court. Orange County named as defendants 13 airlines, an aircraft manufacturer, the City of Newport Beach (Newport) located adjacent to JWA, and several citizens' groups generally opposed to any increase in operations at JWA.

The district court granted a temporary restraining order and subsequently issued a preliminary injunction preventing Newport and the citizens' groups from filing new CEQA actions in state court. Consequently, those parties filed counterclaims against Orange County. The counterclaims alleged violations of CEQA and sought to enjoin Orange County from increasing the number of flights at JWA, constructing the new passenger terminal, or otherwise implementing the Airport Project Plan.

In the spring of 1985, Orange County, Newport, and the citizens' groups began negotiating a settlement. The progress of the negotiations was chronicled by the press. In August, 1985, the parties agreed to a proposed settlement. Irvine claims it became aware of the proposed settlement on or about August 20, 1985. On September 18, 1985, the district court was told of the tentative agreement. On September 20, 1985, Irvine filed a motion to intervene as a matter of right and permissively. Irvine's motion was argued on October 21, 1985, and the district court denied the motion in a final order issued October 28, 1985. The proposed settlement agreement was formally submitted to

the court for approval on November 18, 1985. On December 31, 1985, the district court entered a judgment in accordance with the Stipulation for Entry of Judgment by Certain Settling Parties.

II. DISCUSSION

A. Intervention as a Matter of Right

1. Standard of Review

The district court's denial of a party's motion to intervene as a matter of right is reviewed *de novo*, *United States v. Stringfellow*, 783 F.2d 821, 825 (9th Cir.), *cert. granted on other grounds, sub. nom. Stringfellow v. Concerned Neighbors in Action*, 106 S.Ct. 2273 (1986); *United States v. $129,374 in U.S. Currency*, 769 F.2d 583, 585 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 863 (1986), except for the issue of timeliness, which is reviewed for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 366 (1973); *$129,374 in U.S. Currency*, 769 F.2d at 585.

2. Discussion

A four-part test has been adopted by this circuit to determine whether applications for the intervention as a matter of right pursuant to Rule 24(a)(2) should be granted:

> An order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to

> protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties.

Stringfellow, 783 F.2d at 826 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)).

a. Timeliness

We find that the district court's denial of Irvine's motion to intervene as a matter of right because the motion was untimely was not an abuse of discretion.

In determining timeliness, three factors are weighed: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). Mere lapse of time alone is not determinative. *Id.*

The district court held that "[t]here's no doubt in my mind that the possibility of this settlement unraveling is so prejudicial that to allow the City of Irvine to intervene at this late date would be tantamount to disaster here . . . ." This statement implicates the first two factors that must be weighed. First, Irvine's motion was made only after a proposed, and as it turned out, final settlement had been reached by all the parties after five long years of litigation. In a similar case, this court found that a motion to intervene filed seventeen days after a consent decree had become effective was untimely. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 658 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978). The consent decree had been preceded by extensive and well-publicized negotiations. *Id.* at 659. "Since the motion was filed after the consent decree was approved, the first

factor [the stage of the proceeding] weighs heavily against [the intervenor]." *Id.* at 659. Although Irvine did intervene before the Stipulated Judgment was officially approved by the district court, the fact that Irvine waited until after all the parties had come to an agreement after five years of litigation should nevertheless weigh heavily against Irvine.

"In evaluating the second factor [prejudice to other parties], courts have emphasized the seriousness of the prejudice which results when relief from long-standing inequities is delayed." *Id.* The district court felt that to allow Irvine to intervene "at this late date" would be the undoing of five years of protracted litigation finally resolved by the Stipulated Judgment. Clearly, this would prejudice the parties involved. Equally clear is the fact that the district court judge, who presided over the case from its inception, did not abuse his discretion in recognizing this potential for prejudice to the other parties if Irvine was allowed to intervene.

Thus, to prevail, Irvine must convincingly explain its delay in filing its motion to intervene. Irvine argues that it did not intervene sooner because it did not know until August 20, 1985, the date it learned of the proposed Stipulated Judgment, that its interests were not being adequately represented by the original parties. In other words, this was allegedly the first time that Irvine realized that the end result of the protracted litigation would not be entirely to its liking. In *Alaniz*, the crux of the appellant's agrument was that they did not know the settlement decree would be to their detriment. We held that, surely, they should have known the risks of waiting. *Alaniz*, 572 F.2d at 659. "To protect their interests, appellants should have joined the negotiations before the suit was settled." *Id.* In the case at bar, Irvine should have realized that the

litigation might be resolved by negotiated settlement. The local newspapers reported the ongoing negotiations between the parties. Furthermore, Irvine should have contemplated that due to the serious existing facility contraints at JWA, a likely result of the negotiations would be an agreement to look to other facilities for help, including El Toro. In order to protect itself against this eventuality, Irvine should have intervened sooner.[1] The district court did not abuse its discretion in denying, because it was untimely, Irvine's motion to intervene.

Because we conclude that Irvine's motion to intervene was untimely, we need not reach the remaining elements of the test. Nevertheless, we wish to make clear that Irvine is not precluded by *stare decisis*, collateral estoppel, or res judicata from taking other action.

There is no *stare decisis* effect to any future proceedings Irvine may wish to bring because the product of the litigation at bar was a Stipulated Judgment made pursuant to a negotiated settlement effecting only the signing parties. *See United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 845-46 n.21 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (consent decrees—products of negotiation rather that contested litigation—are not likely to carry *stare decisis* effects measurably adverse to the proposed intervention in any future proceedings).

Nor is there any res judicata or collateral estoppel effect that would impair Irvine's ability to litigate its concerns in a future, separate action. *See Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 143 (2d Cir. 1977) (a judgment entered on stipulation is binding upon the consenting parties only). Furthermore, the Stipulated Judgment itself expressly states that:

pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the judgment to be entered pursuant to this stipulation is a final judgment as to the claims between the settling parties.

B. Permissive Intervention

1. Standard of Review

Permissive intervention is committed to the broad discretion of the district court and is therefore reviewed by this court for abuse of discretion. *United States v. $129,374 in U.S. Currency*, 769 F.2d 583, 586 (9th Cir. 1985).

2. Discussion

A motion for permissive intervention must also be timely. Our conclusion that the district court did not abuse its discretion in denying Irvine's motion to intervene as a matter of right due to its untimeliness applies equally here.

AFFIRMED.

FOOTNOTE

[1] There is credible evidence in the record that Newport or the other defendants never fully represented Irvine's interests and that Irvine should have recognized this much earlier and, thereby, intervened much sooner.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 4 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 85-6501
D.C. NO. CV 85-1542-TJH

COUNTY OF ORANGE,
Plaintiff-Appellee,
v.

AIR CALIFORNIA; AMERICAN AIRLINES; AMERICA WEST AIRLINES; CONTINENTAL AIRLINES INC.; FRONTIER AIRLINES, INC.; JET AMERICA; PACIFIC SOUTHWEST AIRLINES; REPUBLIC AIRLINES, INC.; WESTERN AIRLINES, INC.; ALASKA AIRLINES, INC.; MUSE AIR CORPORATION; TRANS WORLD AIRLINES, INC; UNITED AIRLINES INC.; FEDERAL AVIATION ADMINISTRATION; McDONNELL-DOUGLAS CORPORATION; CITY OF NEWPORT BEACH; STOP POLLUTING OUR NEWPORT CORPORATION; AIRPORT WORKING GROUP OF ORANGE COUNTY, INC.,
Defendants-Appellees.

CITY OF IRVINE,
Applicant for Intervention-Appellant.

ORDER

Before: ANDERSON, POOLE, and THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Action No. CV 85-1542 TJH

FILED
NOV 20 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

COUNTY OF ORANGE,
Plaintiff (s),

v.

AIR CALIFORNIA, et al.,
Defendant (s).

MINUTE ORDER OF JUDGE HATTER

TO COUNSEL OF RECORD:

IT IS ORDERED, in the Court's own motion, that the judgment of the U.S. Court of Appeals for the Ninth Circuit affirming the District Court on the appeal of the City of Irvine be filed and spread upon the records of the court. (Ent _____)

Prepared by Florence Kato
Court Clerk to Judge Hatter

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1305

In The

Supreme Court of the United States

October Term, 1986

THE CITY OF IRVINE,

Petitioner,

v.

COUNTY OF ORANGE, ET AL.,

Respondents.

RESPONDENTS' BRIEF AND SUPPLEMENTAL APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(List of Counsel on Inside Front Cover)

93 pp

Pandick Technologies, Inc., Chicago • (312) 236-0200

O'Donnell & Gordon
Pierce O'Donnell*
Cruz Reynoso
Josephine E. Powe
Mary E. Newcombe
One Bunker Hill
601 West Fifth Street
Suite 1200
Los Angeles, CA 90014
(213) 688-1566

*A Professional Corporation

O'Donnell & Gordon
Steven F. Pflaum,
Counsel of Record
208 South LaSalle Street
Suite 2000
Chicago, IL 60604
(312) 641-0071

Robert H. Burnham
City Attorney
3300 Newport Beach Blvd.
P.O. Box 1768
Newport Beach, CA 92660
(714) 644-3131

Of Counsel:

Judith Resnik
University of Southern
California Law Center
University Park
Los Angeles, CA 90089
(213) 743-7302

Attorneys for Respondent
City Of Newport Beach

Shute, Mihaly & Weinberger
E. Clement Shute, Jr.,
Counsel of Record
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Respondents
Stop Polluting Our Newport
and Airport Working Group Of
Orange County, Inc.

Gatzke & Mispagel
Michael Scott Gatzke,*
Counsel of Record
2890 Pio Pico Drive, Suite E
P.O. Box 1636
Carlsbad, CA 92008
(619) 729-2304

*A Professional Corporation

Adrian Kuyper, County Counsel
Daniel J. Didier, Deputy
County Counsel
10 Civic Center Plaza
P.O. Box 1379
Santa Ana, CA 92702
(714) 834-3300

Attorneys for Respondent
County Of Orange

QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to review a decision of the Ninth Circuit that applied well-established and uniform principles of law to a factually idiosyncratic case in affirming the district court's determination that Petitioner's motion to intervene was untimely?

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Supreme Court Rule 50.7 8

No. 86-1305

In The
Supreme Court of the United States
October Term, 1986

THE CITY OF IRVINE,

Petitioner,

v.

COUNTY OF ORANGE, ET AL.,

Respondents.

RESPONDENTS' BRIEF AND SUPPLEMENTAL APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF FACTS

This petition for a writ of certiorari involves the eleventh-hour attempt of Petitioner City of Irvine ("Irvine") to disrupt a settlement that has ended a longstanding controversy over the operation and proposed expansion of the John Wayne Airport ("the Airport") in Orange County, California. Contrary to Irvine's suggestion (Pet. at 3), an explanation of the events that ultimately led to Irvine's petition must begin in 1982, not 1985.

I. THE ORIGINS OF THIS LITIGATION

The introduction of commercial jet service at the Airport sparked a dispute between Respondent County of Orange ("County"), the proprietor of the Airport, and persons affected by the jet noise. One of several lawsuits spawned by that dispute resulted in a determination in 1982 by the Orange County Superior Court, in an action brought by Respondent City of Newport Beach ("Newport Beach") and a local citizens group, Respondent Stop Polluting Our Newport ("SPON"), that the County had violated the California Environmental Quality Act ("CEQA," California Public Resources Code § 21000 *et seq.*) in connection with its approval of a Master Plan for the expansion of the Airport.[1] The Superior Court enjoined the County from implementing its Master Plan or from increasing the number of flights at the Airport without complying with CEQA. C.R. 39 at 7-8 and Exhibit "A" thereto, S.E.R. 2 at 32-33.[2]

At the same time that the state court environmental litigation was proceeding, a series of federal court actions challenged the County's "Access Plan" for the Airport. The Access Plan determines how many airlines are permitted to operate at the Airport and allocates available flights among them. In that litigation, certain airlines, joined in some instances by the Federal Aviation Administration ("FAA"), contended that different versions of the Access Plan violated federal guarantees against un-

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[1] Newport Beach is located directly south of the Airport. Under prevailing wind conditions, planes departing from the Airport fly over Newport Beach.

[2] The following abbreviations are used to cite the record: "C.R." (Clerk's Record); "E.R." (Excerpts of Record); "S.E.R." (Supplemental Excerpts of Record); "R.T." (Reporter's Transcript); "App." (Appendix to Petition for Writ of Certiorari); and "Supp. App." (Respondents' Supplemental Appendix in Opposition to Petition for Writ of Certiorari (appended hereto)).

just discrimination with regards to access to the airport and allocation of flights. All of the access cases were assigned to the Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California.

The decision in the state court CEQA litigation prompted the County to develop a new Master Plan (the "1984 Master Plan") for the development of the Airport through the year 2005. The 1984 Master Plan proposed a two-phase increase in the number of average daily departures at the Airport–first from 41 to 55 flights, and then, following completion of a new passenger terminal, from 55 to 73 flights. As required by CEQA and the National Environmental Policy Act ("NEPA," 42 U.S.C. § 4321 *et seq.*), the County prepared a joint Environmental Impact Report/Environmental Impact Statement ("EIR/EIS 508") analyzing the Master Plan.

On February 26, 1985, the County's Board of Supervisors adopted the 1984 Master Plan and simultaneously approved a new Access Plan that allocated the 55 daily flights authorized in the Master Plan's initial phase. In addition, the Board of Supervisors certified that EIR/EIS 508 was legally adequate under CEQA. C.R. 39 at 12 and Exhibit "G" thereto, S.E.R. 2 at 37. On March 5, 1985, the County filed its Notice of Determination (which set into motion the applicable 30-day CEQA statute of limitations). C.R. 39 at 13, S.E.R. at 38.

II. THE 1985 JOHN WAYNE AIRPORT LITIGATION

Perceiving itself in the midst of interrelated lawsuits pending in two forums, the County commenced this action on March 6, 1985, to attempt to resolve the environmental and Access Plan issues in one lawsuit. Specifically, the County sought a declaratory judgment that its adoption of the 1984 Master Plan and the new Access Plan complied with state and federal law. The County named as defendants 13 airlines, an aircraft manufacturer, the FAA,

Newport Beach, SPON, and another citizens organization, Respondent Airport Working Group of Orange County, Inc. ("AWG"). C.R. 1, 7, E.R. at 1, 33.

The first three claims in the County's First Amended Complaint requested a declaratory judgment that various aspects of the new Access Plan complied with federal law. The remaining three claims related to the environmental controversies involving the County versus Newport Beach, SPON, and AWG. With respect to the environmental claims, the County sought a declaratory judgment (1) that EIR/EIS 508 complied with CEQA and with that statute's implementing guidelines, and (2) that certain aspects of CEQA were preempted by federal law. In addition, the County requested the Court to enjoin Newport Beach, SPON, and AWG from litigating the CEQA issues in state court. C.R. 7, E.R. at 33-69.

The case was assigned to Judge Hatter. The district court granted a temporary restraining order and subsequently issued a preliminary injunction preventing Newport Beach, SPON, and AWG from filing new CEQA actions in state court. C.R. 11, 29. Consequently, those parties filed counterclaims against the County in this action. The counterclaims alleged violations of CEQA and sought to enjoin the County from increasing the number of flights above 55 average daily departures, from constructing the new passenger terminal, and from otherwise implementing the 1984 Master Plan. C.R. 36, 39, S.E.R. 2 at 26-58, S.E.R. 3 at 59-97.

Thus, until Irvine sought leave to intervene in this lawsuit–which was the first time that Irvine had ever sought to participate in any lawsuit involving John Wayne Airport–this litigation simply involved the County's ability to implement the 1984 Master Plan. The 1984 Master Plan did not contemplate airport development anywhere other than at John Wayne Airport. As explained below, the parties' settlement did not change the Airport project

in that respect.

III. THE AIRPORT SETTLEMENT

A. History of the Settlement Negotiations

In the spring of 1985, the County, Newport Beach, SPON, and AWG began discussing a possible settlement of their longstanding dispute. The parties quickly agreed upon the conceptual framework of the settlement: Newport Beach, SPON, and AWG would drop their opposition to the expansion of John Wayne Airport in return for the County's agreement to place long-term restrictions on the level of operations and the size of facilities at that airport.

The ensuing negotiations proved to be difficult and protracted. The other parties to this case and the district court were kept informed of the general progress of the negotiations through the filing of numerous stipulations requesting extensions of time for filing pleadings and for the hearing of a substantive motion. C.R. 121, 133, 151, 155, 159. The progress of the negotiations was also closely chronicled in the Orange County press. C.R. 139 at 62-70, E.R. at 316-27.

In August 1985, after five months of negotiation, the settling parties achieved their goal: a documented accord that resolved all of the issues between them. Supp. App. 1, C.R. 175, E.R. at 504-26. On September 18, 1985, the district court was informed of the agreement (which still required FAA review). C.R 131. Following careful review by the FAA, the settlement agreement was formally submitted to the court for approval on November 18, 1985.

B. Terms of the Settlement

The heart of the settlement agreement is a 20-year limit that the County, as proprietor of the Airport, agreed to place on the maximum number of average daily departures by the noisiest planes that operate at the Airport and on the maximum number of passengers that may use the Airport in a year. The agreement also imposes reasonable

constraints on the size of the passenger terminal and related facilities. In return for the predictability offered by the 20-year term of the agreement, Newport Beach and the citizens groups agreed not to contest the project and to dismiss all pending federal and state litigation concerning the Airport. Supp. App. 1 at 3a, 12a-13a, C.R. 175, E.R. at 506, 518. Most of the settlement provisions were embodied in a Stipulated Judgment that was entered by the district court on December 13, 1985. Supp. App. 2, C.R. 176, E.R. at 527-30.

Significantly, Irvine has never challenged the County's ability to increase flights at the Airport to the levels contained in the settlement agreement. Nor has Irvine contested the County's decision to build the improvements at the Airport that are described in the settlement.

The settlement agreement is also designed to facilitate the study, and possible future development, of an additional commercial airport in Orange County to supplement the service provided by John Wayne Airport. Prior to the settlement, the County was on record opposing the development of *any* new commercial airports in Orange County. Orange County Board of Supervisors Resolution No. 82-1542 declared that "there is *no* acceptable site within Orange County for a [new] regional or international airport." C.R. 125 at 117, E.R. at 239 (emphasis added). Board of Supervisors Resolution No. 80-215 also stated the County's specific opposition to joint civilian/military use of El Toro Marine Corps Air Station ("El Toro MCAS"). C.R. 125 at 112-13, E.R. at 233-34.

As part of the settlement, the County agreed to rescind both of those resolutions, so as to "wipe the slate clean" with respect to the County's position concerning any potential additional sites. Supp. App. 1 at 3a, C.R. 175, E.R. at 506. Pursuant to that agreement, the County adopted Resolution No. 85-1231, rescinding its prior resolutions. Supp. App. 3 at 21a-25a, C.R. 139, E.R. at 309-14. The

County also agreed to support state or federal funding of certain third-party efforts to study additional sites and to be open-minded about the results of such studies. Supp. App. 1 at 13a, C.R. 175, E.R. at 519. The settlement agreement does not specify any potential sites for study or development. Supp. App. 1, C.R. 175.

Contrary to Irvine's representations to this Court, nothing in the settlement requires the County to support joint civilian/military use of El Toro MCAS, or, for that matter, the development of any additional airport. The County has simply taken a neutral position on future airport sites and development. Board of Supervisors Resolution No. 85-1231, which was passed in connection with the John Wayne Airport settlement, specifically provides that

> "nothing in this resolution, or in the agreement of settlement with the City, SPON and AWG, requires the Board of Supervisors to relinquish in any way its future discretion with respect to its review, or any statement of its position regarding any additional or alternative airport site which might be selected by any such third-party [studies] undertaken in the future . . . ." Supp. App. 3 at 23a, C.R. 139, E.R. at 311.

In short, Irvine's argument that the Airport settlement commits the County to support joint use of El Toro MCAS–the linchpin of Irvine's certiorari petition as well as its claimed interest in this litigation–is completely baseless. *See* Pet. at 6, 7, 8, 10, 11, 13, 15-16, 17, 18, and 21. The stipulation does not oblige the County to "sanction, assist and promote the development of El Toro MCAS as a commercial airport." *Id.* at 7. Nor, in light of the express language of the settlement agreement and the adopting resolution, is such a statement a "fair inference" from the record. *See* Letter dated February 9, 1987, from Irvine's counsel to the Clerk of this Court (Supp. App. 4).[3] As a consequence, Irvine neither claims nor possesses a cogniz-

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[3]In light of the repeated misrepresentations in Irvine's

(Footnote continued on the following page)

able interest in challenging the validity of the expansion of the Airport that is the subject of the settlement agreement and this litigation. Irvine's desire to oppose joint civilian/military use of El Toro MCAS is simultaneously premature and irrelevant.

IV. IRVINE'S MOTION TO INTERVENE

Irvine filed its motion to intervene on September 20, 1985. Irvine's motion and proposed Answer and Counterclaim focused on Irvine's misplaced concern about joint civilian/military use of El Toro MCAS. For example, the Counterclaim alleged that the the Airport settlement "purports to . . . permit joint military and civilian use of El Toro MCAS." C.R. 125 at 98, E.R. at 178. Various causes of action challenged the purported decision to develop El Toro MCAS. C.R. 125 at 91-93, E.R. at 171-73. Similarly, in its motion papers, Irvine contended that intervention was essential to prevent it from losing its rights to contest the development of El Toro MCAS. C.R. 125 at 17-18, E.R. at 95-96. *See also* C.R. 150 at 5, 18-19, E.R. at 414, 427-28.

A hearing was held on Irvine's motion to intervene on October 21, 1985. The district court denied the motion, expressly finding that Irvine had failed to make the requisite showing, "particularly with regard to timeliness." Supp. App. 5 at 65a, R.T. at 41. Drawing upon his familiarity with this controversy, which he had acquired from presiding over the Access Plan litigation since 1982, Judge Hatter also concluded:

"There's little doubt in my mind that the pos-

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3 *(Continued)*

Statement of Facts regarding joint civilian/military use of El Toro MCAS, sanctions would be appropriate pursuant to 28 U.S.C. §1927 and Supreme Court Rules 49.2 and 50.7. *See Tatum v. Regents of University of Nebraska-Lincoln*, 462 U.S. 1117 (1983).

> sibility of this settlement unraveling is so prejudicial that to allow the City of Irvine to intervene at this late date would be tantamount to disaster here." Supp. App. 5 at 65a, R.T. at 42.

Following entry of an order denying its motion, Irvine appealed. C.R. 154, 156. On September 9, 1986, the Court of Appeals affirmed the district court, holding that the district judge had not erred when he had found Irvine's motion untimely. *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986). The Court of Appeals also expressly found that the settlement did not forever bar Irvine from attacking proposals to develop El Toro MCAS. *Id* at 538-39.[4]

REASONS FOR DENYING THE WRIT

Applying established legal principles to this highly fact-specific case, the lower courts properly determined that Irvine's motion to intervene was untimely. Review by this Court is unnecessary to settle important unresolved questions of law and would offer little guidance on how to decide other cases involving the timeliness of intervention.

This case simply results from the parties' dramatically different interpretations of the factual record. Irvine contends that this lawsuit relates to the development of the joint civilian/military use of El Toro MCAS, that Irvine lacks responsibility for not seeking to intervene until the County, Newport Beach, SPON, and AWG had reached their settlement, and that Irvine would be prejudiced if it were not permitted to intervene. Each of those arguments was rejected at the trial and appellate levels. Irvine now seeks to reargue the facts and the law to this Court. However, neither the record nor any uncertainty or conflict

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[4] Irvine chose not to pursue a CEQA challenge to EIR/EIS 508, as it did not file suit within the time period required by state law. *See* Cal. Pub. Res. Code § 21167. Nothing prevented Irvine from filing such a suit. *See County of Orange, supra*, 799 F.2d at 539.

in the applicable law provides any reason for this Court to review this case.

I. THERE ARE NO UNRESOLVED OR IMPORTANT FEDERAL ISSUES RAISED BY THIS CASE

A. This Court Articulated the Relevant Factors Regarding the Timeliness of Motions to Intervene in *NAACP v. New York*

Contrary to Irvine's contention (Pet. at 9), this case does not involve a major issue regarding the application of a federal rule. The question litigated below was whether Irvine should be permitted to intervene, under Rule 24 of the Federal Rules of Civil Procedure, and that question was decided under well-established principles. *See NAACP v. New York*, 413 U.S. 345 (1973).

Indeed, Petitioner does not suggest (nor could it) that the decision below conflicts with this Court's precedent. One of the central holdings of both the trial and appellate courts was that Irvine's application to intervene was not timely. This Court has held that the determination of the timeliness of a motion to intervene is a matter committed to the sound discretion of the trial court and that a determination is to be made from "all the circumstances." *NAACP*, 413 U.S. at 366. In *NAACP*, a delay of only two and one-half weeks by prospective intervenors who were dissatisfied with a settlement reached by the original parties was held to be "untimely" because the would-be intervenors should have known of the likelihood that the lawsuit could be settled. This Court held that the would-be intervenors had a duty "to take affirmative steps to protect their interests." *Id.* at 367.

Both the trial court's ruling in this case and the appellate court's affirmance fall squarely within the *NAACP* parameters. Here, as in *NAACP*, the would-be intervenor had ample information about the prospect of settlement,

which was the result of negotiations that had been widely publicized for at least five months. C.R. 139 at 62-70, E.R. at 316-27. Here, as in *NAACP*, the would-be intervenor had a duty to act quickly but failed to do so. The appellate court carefully appraised the "five long years of litigation," the "extensive and well-publicized negotiations," and "the fact that Irvine waited until after all the parties had come to an agreement." *County of Orange*, 799 F.2d at 538. Moreover, the appellate court took into consideration that the district judge, who had lived with the dispute for years, found that belated entry of a new participant would be "so prejudicial that to allow the City of Irvine to intervene at this late date would be tantamount to disaster here." *Id.*

In short, this case is simply one of hundreds in which lower courts have applied the *NAACP* ruling to specific facts. No important or novel issue about the interpretation of Rule 24 is presented on this record. Irvine disagrees with the factual premises of the lower courts' rulings–namely, the extent of Irvine's delay before seeking to intervene and the impact of intervention on the settling parties–and the legal conclusions to be drawn from those facts. But such a disagreement is not grounds for certiorari.

B. No Other Federal Issues Warrant Review by This Court

Straining to make this case seem appropriate for review, Irvine claims that the determination of its timeliness under Federal Rule of Civil Procedure 24 "necessarily will have a strategic impact" on "the disposition of federal lands, namely, the El Toro MCAS." Pet. at 10. This is nonsense. No matter how many times Irvine repeats or alludes to that claim (*see* Pet. at 6, 7, 8, 10, 11, 13, 15-16, 17, 18, and 21), the County simply has not agreed to "sanction, assist and promote the development of El Toro MCAS as a commercial airport." *Id.* at 7. As Irvine's counsel practically admits, all the settlement did with respect to El Toro was to require the County to "repeal . . . its earlier resolu-

tion opposing commercial airline use of El Toro . . . ." Supp. App. 4 at 26a. Of course, the settlement also required the County to rescind a resolution stating the County's opposition to the development of *any* new commercial airport in Orange County. Supp. App. 1 at 3a, C.R. 175, E.R. at 5-6; Supp. App. 3 at 21a-25a, C.R. 139, E.R. at 309-14; C.R. 125 at 117, E.R. at 239.

The County's withdrawal of its resolutions opposing the development of a new airport did not reflect a decision to support development of a new airport anywhere in Orange County, let alone at any particular site. Supp. App. 3 at 23a, C.R. 139, E.R. at 311. Moreover, any eventual decision to develop a new commercial airport in Orange County would have to be preceded by careful environmental review of proposed and alternative sites with the active participation of all affected parties. *See* 42 U.S.C. § 4332 (required environmental review under NEPA); Cal. Pub. Res. Code § 21100 (required environmental review under CEQA); 49 U.S.C. § 2208(b)(6)(A) (requiring "public hearings for the purpose of considering the economic, social, and environmental effects of [a proposed] airport . . . and its consistency with the goals and objectives of such planning as has been carried out by the community"). Under these circumstances, this lawsuit has not determined the "disposition of public lands" and could not possibly do so.

Finally, this case is not one of "sheer importance" to all of Southern California. Pet. at 10. While clearly important to the settling parties and to a public eager for more flights at the Airport, the courts below have not issued a ruling of national significance. Indeed, even Irvine does not oppose the settlement's increased operations or improved terminal facilities at John Wayne Airport, and Irvine's opposition in this lawsuit to commercial use of El Toro MCAS is premature and irrelevant.

This case simply involves a group of litigants who settled a portion of a complex and protracted dispute only

to have a would-be intervenor with little or no interest in the subject of the litigation appear at the eleventh hour to attempt to destroy the settlement. The courts here properly held under settled law that belated intervention was inappropriate, and review by this Court of the mundane timeliness issue presented by these idiosyncratic facts is unwarranted.

C. The Decision of the Ninth Circuit Is Not in Conflict With the Decisions of Other Circuits

In a final effort to persuade this Court to review the decision below, Irvine has attempted to magnify insubstantial distinctions in the ways in which the different circuits frame their timeliness inquiry under Rule 24. (Pet. at 14-16.) Neither the record in this case nor the law from other circuits supports Irvine's claim that variations in the articulation of the timeliness standard threaten the uniformity of the federal system.

As noted above, all of the circuits are governed by this Court's statement in *NAACP*, *supra*, 413 U.S. at 366, that the timeliness of a motion for intervention depends upon "all the circumstances." The Ninth Circuit has broken down the *NAACP* test into an evaluation of three primary factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties if intervention is permitted; and (3) the reason for and the length of the intervenor's delay. *County of Orange*, 799 F.2d at 537 (citing *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)). The Third, Sixth, and Eighth Circuits have adopted a similar formulation. *See Donovan v. United Steelworkers of America, AFL-CIO*, 721 F.2d 126, 127 (3d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982); *Arkansas Electric Energy Consumers v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985) (citing *Nevilles v. EEOC*, 511 F.2d 303, 305

(8th Cir. 1975) (per curiam)).

On the other hand, the Fifth (and now Eleventh) Circuits prefer a four-prong timeliness test. Using different words to describe essentially the same considerations as the Ninth Circuit, those courts examine: (1) the length of time in which the applicant should have known of its interest; (2) the prejudice to existing parties if intervention is allowed; (3) the prejudice to the intervenor if intervention is denied; and (4) the existence of other circumstances militating in favor of or against intervention. *See, e.g., Stallworth v. Monsanto*, 558 F.2d 257, 264-66 (5th Cir. 1977); *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). *See also Culbreath v. Dukakis*, 630 F.2d 15, 20-25 (1st Cir. 1980) (citing *Stallworth* with approval).

The slight differences in the wording of the two approaches do not reflect a material conflict among the circuits. Irvine claims that the standards are different because the Ninth Circuit, unlike the Fifth and Eleventh Circuits, allegedly does not consider whether the intervenor would be prejudiced if intervention is denied. However, the Ninth Circuit has expressly noted the relevance, particularly under a Rule 24(a) intervention-as-of-right analysis, of potential prejudice to the applicant for intervention. *United States v. Oregon*, *supra*, 745 F.2d at 552. Indeed, the Court here expressly noted that denial of Irvine's motion would not impair Irvine's ability to oppose the settlement or civilian use of El Toro MCAS. *County of Orange*, *supra*, 799 F.2d at 539 ("Irvine is not precluded by *stare decisis*, collateral estoppel, or res judicata from taking other action [against the settlement]").

Thus, as one would expect given this Court's explanation of the timeliness requirement in the *NAACP* case, all of the circuits engage in the very same inquiry under Rule 24. This case provides an excellent example of both a trial and an appellate court properly applying this Court's

law, dutifully considering "all the circumstances" in determining the timeliness of a motion to intervene. The district court carefully considered the evidence, made factual determinations, and concluded that, in light of Irvine's own delay in filing its motion, intervention was not appropriate. This determination can be reversed only upon a showing of abuse of discretion. *See NAACP*, *supra*, 413 U.S. at 366. As the Court of Appeals concluded, that showing has not been, and cannot be, made in this case.

D. There Are No Other Grounds for Certiorari

Irvine reveals its essential ground for seeking certiorari when it claims that the decision below was "erroneous and inequitable." Pet. at 16. While Irvine may be unhappy with the decisions of the courts below, unhappiness is not grounds for a certiorari petition, nor is it this Court's function to overturn every discretionary trial court determination with which it might disagree. Irvine has only reargued here what it unsuccessfully argued below: that it really ought to have been permitted to intervene. The district court judge who had spent years with this and related litigation concluded that Irvine's request came too late and that the impact of intervention would have been too harmful on the other parties. That determination, as well as the Ninth Circuit's affirmance after hearing all of the arguments Irvine presents here, was well within the boundaries of Rule 24 and the holding in *NAACP v. New York*.

CONCLUSION

This lawsuit presents a classic example of a case in which none of the grounds for certiorari are present. The decisions below follow well-established law set forth by this Court. There are no major, unresolved issues presented by this case; nor are there questions of such significant national interest as to merit review. Moreover, the idiosyncratic and highly complex set of interactions involved in this case would render any decision by this Court of little, if any, assistance to other litigants. Finally, review would serve little purpose because the same result would be reached here even if Irvine's intervention had been timely: Irvine was not entitled to intervene as of right because it did not have a legally cognizable interest in this lawsuit (which, contrary to Irvine's claim, did not involve civilian use of El Toro MCAS); and Irvine was not entitled to intervene permissively because (1) the district court did not abuse its discretion in finding that Irvine's intervention would have unduly delayed and prejudiced the original parties, and (2) Irvine had no claim or defense in common with questions of law or fact in this case.

The courts below properly discharged their respective responsibilities in analyzing the key factual determinations upon which this case was decided. *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1512 (1985) (emphasizing deference to trial court factual determinations). Those determinations are undeserving of review by this Court, and the writ of certiorari should be denied.

DATED: March 5, 1987

Respectfully Submitted,

O'Donnell & Gordon
Pierce O'Donnell*
Cruz Reynoso
Josephine E. Powe
Mary E. Newcombe
One Bunker Hill
601 West Fifth Street
Suite 1200
Los Angeles, CA 90014
(213) 688-1566

*A Professional Corporation

O'Donnell & Gordon
Steven F. Pflaum,
Counsel of Record
208 South LaSalle Street
Suite 2000
Chicago, IL 60604
(312) 641-0071

Robert H. Burnham
City Attorney
3300 Newport Beach Blvd.
P.O. Box 1768
Newport Beach, CA 92660
(714) 644-3131

Of Counsel:

Judith Reinix
University of Southern
California Law Center
University Park
Los Angeles, CA 90089
(213) 743-7302

Attorneys for Respondent
City Of Newport Beach

Shute, Mihaly & Weinberger
E. Clement Shute, Jr.,
Counsel of Record
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Respondents
Stop Polluting Our Newport
and Airport Working Group Of
Orange County, Inc.

Gatzke & Mispagel
Michael Scott Gatzke,*
Counsel of Record
2890 Pio Pico Drive, Suite E
P.O. Box 1636
Carlsbad, CA 92008
(619) 729-2304

*A Professional Corporation

Adrian Kuyper, County Counsel
Daniel J. Didier, Deputy
County Counsel
10 Civic Center Plaza
P.O. Box 1379
Santa Ana, CA 92702
(714) 834-3300

Attorneys for Respondent
County Of Orange

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COUNTY OF ORANGE,
Plaintiff,

v.

AIR CALIFORNIA, et al.
Defendants.

CITY OF NEWPORT BEACH
Counterclaimant,

v.

COUNTY OF ORANGE; ORANGE COUNTY BOARD OF SUPERVISORS; and DOES 1 through 1,000, Inclusive,
Counterdefendants.

AND RELATED COUNTERCLAIMS.

No. CV 85-1542 TJH (MCx)

STIPULATION FOR ENTRY OF FINAL JUDGMENT BY CERTAIN SETTLING PARTIES

I. BASIS FOR STIPULATION

1. The County of Orange ("County"), the City of Newport Beach ("City"), Stop Polluting Our Newport ("SPON"), and the Airport Working Group of Orange County, Inc. ("AWG") (hereinafter collectively referred to as "the settling parties"), by their respective counsel of record, enter into this stipulation to implement the settlement of the longstanding dispute between the settling parties concerning the development and operation of John Wayne Airport ("JWA"). The Judgment to be entered pursuant to this stipulation would (1) adjudicate that EIR 508/EIS is legally adequate for the "EIR 508/EIS Project"

(as that term is hereafter defined) under the California Environmental Quality Act, the National Environmental Policy Act, and all relevant state and federal implementing regulations; and (2) provide for enforcement of certain specific aspects of the settlement agreement of the parties in respect of, or related to the controversies among them regarding the development and operation of JWA (and agreed upon limitations regarding such development and operation) through the year 2005.

2. The compromise settlement reached by the settling parties reflects, under all of the circumstances, the individual judgments of the settling parties regarding an appropriate or acceptable balance between demand for air travel services in Orange County and any adverse environmental effects associated with the operation of JWA. Recognizing that JWA is incapable of satisfying the demand for air travel in Orange County, this settlement is also designed to permit studies regarding the possible future development of an additional airport to serve Orange County. The settling parties acknowledge that, without this settlement and Judgment, protracted litigation would continue and create a continuing risk both of impeding or preventing the County's development of JWA, and its ability to create additional access opportunities for commercial operators desiring to use JWA.

3. Other provisions of the settling parties' agreement will not be embodied in the Judgment. Those provisions include the actions undertaken by the County in connection with the adoption of Resolution Nos. 85-1231, 85-1232 and 85-1233 concerning certification of EIR 508, adoption of additional mitigation measures, and additional airport site studies in Orange County, and the parties' dismissal of other litigation concerning JWA. These provisions also include a resolution of the City of Newport Beach (Resolution 85-67). The parties acknowledge that each of the undertakings in the referenced resolutions represent a material part of the consideration pertaining to this settlement.

4. In reaching this settlement, the settling parties have considered operational and other factors applicable to John Wayne Airport which may not be applicable to any other airport. This stipulation is site specific to JWA, premised upon its unique history, operational characteristics and limitations, and shall not be deemed applicable to any other airport.

5. Not all of the parties to this litigation have agreed to the terms of this settlement. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the judgment to be entered pursuant to this Stipulation is a final judgment only as to the claims between the settling parties.

6. This stipulation and judgment is not intended to, and shall not, create any rights in favor of any persons other than the settling parties.

II. DEFINITIONS

For purposes of this Stipulation and Judgment, the terms below are defined as follows:

7. "ADD" means "average daily departure," which is computed on an annual basis, from April 1 of each year to March 31 of the following year ("the Plan Year"). One ADD is equal to 365 departures by Class A or Class AA aircraft during each Plan Year (or 366 departures in any "leap year"), subject to any adjustments which may result from the implementation or enforcement of any County regulation for JWA or this Judgment (except that no ADD shall consist of more departures in a Plan Year than there are days in that year). "ADD" includes all Class A or Class AA departures, except emergency or mercy flights, departures resulting from mechanical failures, emergency or weather diversions to JWA necessary to reposition an aircraft into its normal scheduling rotation, the repositioning of aircraft to another airport in connection with a published change in the previous schedule of operations of the airline, test or demonstration flights authorized in advance by the airport manager, or charter flights by persons

not engaged in regularly scheduled commercial service at JWA.

8. "Class A Aircraft" means aircraft which:

(a) are used in regularly scheduled commercial service at JWA; and

(b) generate actual energy average SENEL levels, averaged during each Noise Compliance Period, as measured at the Criterion Monitoring Stations, which are not greater than the following values:

M1:	98.5 dB SENEL
M6:	100.0 dB SENEL
M7:	100.0 dB SENEL

In determining whether an aircraft is a Class A aircraft, its noise performance at the Criterion Noise Monitoring Stations shall be determined at each individual station. An aircraft must meet each of the monitoring station criteria, without "trade-offs," in order to qualify as a Class A aircraft. The existing Departure Noise Monitoring Stations will be kept in operation and in good repair during the Project Period, and test procedures for determination of Class A, Class AA, and Exempt Aircraft shall be no less stringent than those provided for in the County's commercial airline access plan in effect on August 1, 1985. During the Project Period, quarterly noise reports and all test data concerning aircraft classification qualification tests at JWA shall be prepared and maintained as public records.

9. "Class AA Aircraft" means aircraft, other than Exempt Aircraft, which:

(a) are used in regularly scheduled commercial service at JWA: and

(b) generate actual energy averaged SENEL levels, averaged during each Noise Compliance Period, which are not greater than 89.5 dB SENEL at *any* Departure Noise Monitoring Station.

In determining whether an aircraft is a Class AA

aircraft, its noise performance at the Departure Noise Monitoring Stations shall be determined at each individual station. An aircraft must meet each of the Departure Noise Monitoring Station criteria, without "trade-offs," in order to qualify as a Class AA aircraft.

10. "Commercial Air Carrier" means any person which operates regularly scheduled commercial service into and out of JWA for the purpose of carrying passengers or freight, or for any other regularly scheduled commercial purpose.

11. "Commuter Air Carrier" means any person which operates regularly scheduled commercial service into and out of JWA for the purpose of carrying passengers or freight, or for any other regularly scheduled commercial purpose, with aircraft which, under the definitions and limitations of this stipulation and Judgment, do not require an allocation of ADDs for their operation at JWA (*i.e.*, "Exempt Aircraft").

12. "Criterion Noise Monitoring Stations" means those noise monitoring stations of the JWA noise monitoring system at the location of monitoring stations M6, M7 and M1 as of August 1, 1985.

13. "Departure Lounge Holding Area" means interior square footage adjacent to an air carrier or commuter gate within a "secure holding area" that is designed to be used as a seating lounge or waiting area in connection with arriving and departing flights. "Departure Lounge Holding Area" does not mean, for purposes of this stipulation and Judgment, any common passage areas in a secure holding area intended to allow the public to achieve access to a Departure Lounge Holding Area, or any other public space in a secure holding area which is devoted to public purposes other than a seating lounge or waiting area.

14. "Departure Noise Monitoring Stations" means those noise monitoring stations of the JWA noise monitoring system at the location of JWA monitoring stations M6,

M7, M1, M2, M3 and M8 as of August 1, 1985.

15. "EIR 508/EIS Project" means that certain "project" including related plans for development, activities and other related elements and approvals which are collectively defined and mitigated by County EIR 508, Board of Supervisors' Resolutions 85-255 through 85-258 and the related resolutions 85-259 and 85-260, all adopted on February 26, 1985, Board of Supervisors' Resolution 85-387 (March 20, 1985), and Board of Supervisors' Resolutions 85-1231 through 85-1233. It also includes all processing and approvals, and contemplated activities considered by the Federal Aviation Administration in its consideration and approval of the EIR 508 documentation as an Environmental Impact Statement prepared, circulated, considered and approved under the National Environmental Policy Act. The term also includes the terms of this stipulation and the Stipulated Judgment.

16. "Exempt Aircraft" means any aircraft used in regularly scheduled commercial service at JWA which, when measured by actual energy averaged SENEL levels during any Noise Compliance Period, does not exceed 86.0 dB SENEL on departure at any of the Departure Monitoring Stations.

17. "MAP" means million annual passengers, consisting of the sum of actual deplaning and enplaning passengers served by all Commercial and Commuter Air Carriers at JWA during each Plan Year.

18. "Noise Compliance Period" means each calendar quarter during the Project Period.

19. "Phase I" means the period from February 26, 1985, to the date on which Phase II begins.

20. "Phase II" means the period that begins on April 1, 1990, or the date on which the County records a notice of completion on the new commercial passenger terminal, whichever is later, and ends on December 31, 2005.

21. "Plan Year" means each period during the Project Period, from April 1 of one year to March 31 of the following year.

22. "Project Period" means the period from February 26, 1985 to December 31, 2005.

23. "Regulated ADDs" means average daily departures during a Plan Year by Class A and Class AA aircraft operated by Commercial Air Carriers.

III. STIPULATION FOR ENTRY OF JUDGMENT

In recognition and consideration of the foregoing recitals and definitions, the settling parties stipulate to the entry of Judgment that contains the terms stated below.

A. Adequacy of EIR 508/EIS

24. Judgment may be entered by the Court on the County's First Amended Complaint for Declaratory and Injunctive Relief, and the Counterclaims of the City, SPON, and AWG, adjudicating that EIR 508/EIS is legally adequate and complete under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000 *et seq.*), the State CEQA Guidelines (14 Cal.Admin.Code Section 15000 *et seq.*, the National Environmental Policy Act ("NEPA") (42 U.S.C. Section 4321 *et seq.*) and all relevant federal implementing regulations with respect to the EIR 508/EIS Project, including, but not limited to, implementation of the physical facilities improvements, airport layout plan, land use plans, and aircraft operations and MAP levels permitted by the project. To the extent that the County's First Amended Complaint, or the counterclaims in this action by the City, SPON and the AWG, raise any controversies other than the adequacy of EIR 508/EIS under the provisions of CEQA, NEPA and all relevant implementing regulations, such claims and controversies shall be dismissed without prejudice.

25. Each settling party shall bear its own costs and

attorneys' fees in connection with this litigation.

B. Flight and MAP Limits

26. During Phase I, there shall be a maximum of 55 ADDs by Class A and Class AA aircraft (regardless of whether or not the County has specifically allocated any such ADDs to any Commercial Air Carrier). No aircraft generating noise levels greater than that permitted for Class A aircraft shall be permitted to engage in regularly scheduled commercial service at JWA. Of the 55 ADDs permitted during Phase I, no more than 39 ADDs may be by Class A aircraft.

27. During Phase I, JWA shall serve no more than 4.75 MAP during any Plan Year.

28. During Phase II, there shall be a maximum of 73 ADDs by Class A and Class AA aircraft (regardless of whether or not the County has specifically allocated any such ADDs to any Commercial Air Carrier). No aircraft generating noise levels greater than that permitted for Class A aircraft shall be permitted to engage in regularly scheduled commercial service at JWA. Of the 73 ADDs permitted during Phase II, no more than 39 ADDs may be by Class A aircraft.

29. During Phase II, JWA shall serve no more than 8.4 MAP during any Plan Year.

C. Facilities Constraints

30. Paragraphs 31 through 35, below, contain agreements of the County on the maximum permissible size of certain facilities improvements related to the proposed commercial passenger terminal to be developed as part of the EIR 508/EIS Project (and reducing the capacity of certain other related facilities) that can be made at JWA through the end of Phase II.

31. During the Project Period, John Wayne Airport shall have a commercial passenger terminal with a maximum interior floor space consisting of areas which are

leaseable to tenants, or common areas available for public use and access, of not more than 271,000 square feet. This interior floor space restriction does not include, and does not apply to space utilized for airport administration areas, "mechanical/electrical areas," "structural areas," or "terminal curb areas." The total terminal size, including the "mechanical/electrical areas" and "structural areas", but excluding any "terminal curb area," may not exceed 337,900 square feet.

32. During Phase II, no building at JWA, other than the commercial passenger terminal, or buildings leased to Fixed Based Operators with limited commuter operations, shall be used by Commercial or Commuter Air Carriers for passenger or cargo handling activities.

33. Any Departure Lounge Holding Area designed to serve a loading bridge in the terminal shall be designed for use in connection with only one loading bridge. Each such Departure Lounge Holding Area shall have a physical separation from any other such Departure Lounge Holding Area with a permanent fixture barrier not less than 36 inches high. The commercial passenger terminal shall contain a maximum of 37,000 interior square feet for all Departure Lounge Holding Areas.

34. There may be a maximum of fourteen (14) loading bridges, of which no more than nine (9) may be sized for aircraft as large as the Boeing-767. The remaining five (5) loading bridges shall be designed for aircraft no larger than the Boeing 757 aircraft. Each loading bridge may serve no more than one flight at a time.

35. There may be a maximum of 8,400 parking spaces, not including spaces contained in the existing North Clear Zone Parking Facility. The terminal parking structure may have no more than four levels. Space devoted to parking may not be converted to other terminal uses.

D. Other Stipulated Provisions

36. Consistent with its existing or to be assumed obligations under contractual agreements with the United States of America under provisions of the Airport and Airway Development Act of 1970 (as amended) (former 49 U.S.C. Section 1701 *et seq.*) or the Airport and Airway Improvement Act of 1982 (49 U.S.C. Section 2201 *et seq.*), the County shall establish and maintain a rate and fee structure which will ensure that the operation of JWA will be self-supporting during the Project Period. Except for short-term borrowing in order to alleviate temporary cash flow problems, or other emergency needs, the County will not use its general funds to subsidize directly the construction or routine operation of JWA. (This limitation recognizes that in the ordinary course of the County's business, certain County staff and personnel engage in activities supported by general funds which may indirectly relate to the operation of JWA. It is not the purpose or effect of this stipulation to preclude the County from continuing such general fund supported activities which are incidental to the routine operation of the airport.) Nothing in this paragraph, or this stipulation, is intended to, nor shall it be construed as, making the settling parties (other than the County), or any other person, parties to, or third party beneficiaries of, any contractual agreements between the County, as airport proprietor of JWA, and the United States of America (or any of its agencies).

37. The existing curfew regulations and hours for JWA, contained in County Ordinance 3505, and the provisions of paragraph 4 at page 62 of Board of Supervisor's Resolution 85-255 (February 26, 1985), reducing the curfew exemption threshold to 86.0 dB SENEL, shall remain in effect during the Project Period; except that the County shall retain its full discretion to extend the curfew hours. Nothing in this paragraph precludes or prevents the JWA Airport Manager, his designated representative, or some other person designated by the Board of Supervisors from

exercising reasonable discretion in authorizing a regularly scheduled commercial departure or landing during the curfew hours where: (1) such arrival or departure was scheduled to occur outside of the curfew hours; and (2) the arrival or departure has been delayed because of mechanical problems, weather or air traffic control delays, or other reasons beyond the control of the commercial operator. In addition, this paragraph does not prohibit authorization of *bona fide* emergency or mercy flights during the curfew hours by aircraft which would otherwise be regulated by the curfew provisions and limitations.

38. In mitigation of the EIR 508/EIS Project, and for other reasons, the County has adopted a "General Aviation Noise Ordinance" ("GANO") (County Ordinance 3505). The principal policy objective of the GANO is to exclude from operations at JWA general aviation aircraft which generate noise levels greater than the noise levels permitted for aircraft used by Commercial Air Carriers. During the Project Period, the County shall maintain in effect an ordinance which meets this basic policy objective. Nothing in this stipulation precludes the County from amending the GANO to enhance or facilitate its reasonable achievement of its principal purpose, or the effective enforcement of its provisions.

39. During the Project Period, the City, SPON, AWG, their agents, attorneys, officers, elected officials and employees agree that they will not challenge, impede or contest, by or in connection with litigation, or any adjudicatory administrative proceedings, or other action, the funding, implementation or operation of the EIR 508/EIS Project by the County and the United States; nor will they urge other persons to do so, or cooperate in any such efforts by other parties except as may be expressly required by law. Nothing in this paragraph prohibits the settling parties from submitting comments or presenting testimony upon any future environmental documentation which may be prepared by the County; or from challenging any project

which is not part of the EIR 508/EIS Project.

40. The Board of Supervisors shall not arbitrarily withhold approval, endorsement or support of any application by a qualified entity or consortium of entities submitted pursuant to Board of Supervisors' Resolution 85-1231 which seeks a reasonable level of state or federal funding for a study or studies concerning a site for an additional airport to supplement JWA.

41. During the Project Period, the City agrees that it will, at its expense, actively join the County in defending, in any pending or future litigation, the EIR 508/EIS Project or the County's regulations or actions in implementation of, or enforcing limitations upon, the project.

42. It is specifically acknowledged by the parties that the County has received a request by PSA to operate exempt aircraft in regularly scheduled service at JWA, and may receive other such requests in the future. The County intends in the near future to develop amendments to its existing access plan or other airport regulations to provide for a means to allocate exempt aircraft operating opportunities within the MAP level agreed to in this stipulation. The development and implementation of such regulatory mechanisms is expressly acknowledged to be an element of the implementation of the EIR 508/EIS Project, and no additional or further environmental documentation under CEQA or NEPA shall be necessary to allow the County to develop and process such regulations and applications.

43. Any notices given under this stipulation shall be addressed to the parties as follows:

FOR THE COUNTY:

Adrian Kuyper, County Counsel
Office of the County Counsel
10 Civil Center Plaza
P.O. Box 1379
Santa Ana, California 92702

with a copy to:

Michael Scott Gatzke
Gatzke, Lodge & Mispagel
2890 Pio Pico
P.O. Box 1636
Carlsbad, California, 92008

FOR THE CITY:

City Manager
City of Newport Beach
3300 Newport Beach Blvd.
P.O. Box 1768
Newport Beach, California 92658-8915

with a copy to:

Pierce O'Donnell
O'Donnell & Gordon
619 South Olive, Ste. 300
Los Angeles, California 90014

FOR SPON AND AWG:

E. Clement Shute, Jr.
Shute, Mihaly & Weinberger
396 Hayes Street
San Francisco, California 94102

At any time, any party may change the person designated to receive notices under this stipulation by giving written notice of such change to the other parties.

IV. ENFORCEMENT OF THE JUDGMENT

44. The stipulations in the other pending state and federal litigation matters pending among the settling parties shall not be filed until the entry of the Stipulated Judgment authorized by this stipulation.

45. If a dispute arises concerning interpretation of, or a settling party's compliance with, this Judgment, and if no exigent circumstances require immediate court proceed-

ings, any settling party raising such issue of interpretation or compliance shall provide written notice of such dispute to the other settling parties. Within twenty-one (21) days of the sending of such notice, the parties shall meet in person (or by their authorized representatives) and attempt in good faith to resolve the dispute.

46. If any such dispute has not been resolved within thirty-five (35) days of the sending of written notice, or if exigent circumstances require immediate court proceedings, any settling party may initiate enforcement proceedings in this action. A settling party seeking to compel another settling party to obey the Judgment must file a Motion to Enforce Judgment. The settling parties agree not to resort to, request, or initiate proceedings involving the contempt powers of the Court in connection with a Motion to Enforce Judgment.

47. If the Court determines that a party is not complying with the Judgment, the Court shall issue an order, in the nature of specific performance of the Stipulated Judgment, requiring the defaulting party to comply with the Judgment within a reasonable period of time. If the defaulting party thereafter fails to comply with such an order, the other settling parties may then seek enforcement under any authorized processes of the Court.

V. TERM OF AGREEMENT

48. This stipulation is contingent upon the Court's entry of the Judgment pursuant to this stipulation ("the Stipulated Judgment"). If the Stipulated Judgment is not entered, this stipulation shall be null and void, and shall not be admissible for any purpose. Unless terminated at an earlier date in the manner described in paragraphs 49-51 below, this stipulation and Stipulated Judgment shall be effective for the Project Period.

49. The City, SPON or the AWG may file a Motion to Vacate Judgment if, in any action which they have not

initiated:

(a) Any trial court enters a final judgment which determines that the limits on the number of Regulated ADDs, Class A ADDs, the distinction between Class A and Class AA aircraft, MAP levels or facilities improvements contained in this stipulation, the curfew provisions of paragraph 37 of this stipulation, or the provisions of paragraph 38 of this stipulation are unenforceable for any reason, and that any of these stipulated limitations are exceeded;

(b) Any trial court issues a preliminary injunction which has the effect of precluding implementation or enforcement of the limits on the number of Regulated ADDs, Class A ADDs, the distinction between Class A and Class AA aircraft, MAP levels or facilities improvements contained in this stipulation, the curfew provisions of paragraph 37 of this stipulation or the provisions of paragraph 38 of this stipulation, based upon a finding of a probability of making at trial any of the determinations described in subparagraph (a) above, and such preliminary injunction remains in effect for a period of one (1) year or more, and any of these stipulated limitations are exceeded; or

(c) Any appellate court issues a decision or order which makes any of the determinations described in subparagraphs (a) or (b) above, or affirms a trial court ruling based upon such a determination, and any of these stipulated limitations are exceeded.

50. The County may file a Motion to Vacate Judgment if the City fails to comply with the provisions of paragraph 41 of this stipulation, or either the City, SPON or the AWG file or participate in a lawsuit or adjudicatory administrative proceeding, or assist another person in any such lawsuit or proceeding, for the purpose, or to the effect of impeding implementation of the EIR 508/EIS Project or

otherwise take action in violation of paragraph 39 of this stipulation. This provision shall not apply to activities expressly permitted by paragraph 39 of this stipulation.

51. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Court shall, after consideration of a motion to vacate judgment, enter an order vacating the Stipulated Judgment if it determines that any of the conditions described in paragraphs 49 or 50 have occurred. Once vacated, the Judgment and this stipulation shall be null and void, unenforceable and inadmissible for any purpose, and the parties will be deemed to be in the same position that they occupied before the Stipulated Judgment and stipulation was executed and entered in respect of this litigation, and they shall have the full scope of their legislative and administrative prerogatives.

52. The limitations on Regulated ADDs, Class A ADDs, the distinction between Class A and Class AA aircraft, MAP levels and commercial passenger terminal facilities provided for in this stipulation, the provisions of paragraphs 37 and 38 of this stipulation, and the agreements of the City, SPON and AWG not to contest or impede implementation of the EIR 508/EIS Project (paragraph 39 or this stipulation), are fundamental and essential aspects of this settlement, and were agreed upon with full recognition of the possibility that economic, demographic, technological, operational or legal changes not currently contemplated could occur during the Project Period. It was in recognition of these essential aspects of the settlement, and the inability to predict with certainty certain future conditions that the settling parties have agreed to the specific and express provisions of paragraph 49 of this stipulation. The settling parties further acknowledge that this settlement provides for the settling parties to perform undertakings at different times, and that the performance of certain of the undertakings, once accomplished, could not be undone. Accordingly, except as provided herein, the set-

tling parties expressly waive any potential right to seek to modify or vacate the terms of the settlement or the Stipulated Judgment, except by mutual agreement.

DATED: 10/15/85

MICHAEL SCOTT GATZKE
MARK J. DILLON
Gatzke, Lodge & Mispagel

Attorneys for Plaintiff and Counterdefendants, the County of Orange and the Orange County Board of Supervisors

By /s/ _____
Michael Scott Gatzke

DATED: November 18, 1985

PIERCE O'DONNELL*
STEVEN F. PFLAUM
JOSEPHINE E. POWE
O'Donnell & Gordon

* A Professional Corporation

Attorneys for Defendant, Counterclaimant and Cross-Defendant, the City of Newport Beach

By /s/ _____
Steven F. Pflaum

DATED: November 16, 1985

E. CLEMENT SHUTE, JR.
Shute, Mihaly & Weinberger

Attorneys for Defendants, Counterclaimants and Cross-Defendants, Stop Polluting Our Newport and the Airport Working Group of Orange County, Inc.

By /s/ _____
E. Clement Shute, Jr.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COUNTY OF ORANGE,
Plaintiff,

v.

AIR CALIFORNIA, et al.
Defendants.

CITY OF NEWPORT BEACH
Counterclaimant,

v.

COUNTY OF ORANGE; ORANGE COUNTY BOARD OF SUPERVISORS; and DOES 1 through 1,000, Inclusive,
Counterdefendants.

AND RELATED COUNTERCLAIMS.

No. CV 85-1542 TJH (MCx)

FINAL JUDGMENT ENTERED ON STIPULATION FOR ENTRY OF JUDGMENT BY CERTAIN SETTLING PARTIES

Pursuant to the stipulation of the parties, and there being no just reason for delaying entry of this Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment is hereby entered in favor of the County of Orange and the Orange County Board of Supervisors ("the County"), and against the City of Newport Beach ("the City"), Stop Polluting Our Newport ("SPON"), and the Airport Working Group of Orange County, Inc. ("AWG") on the Fourth, Fifth and Sixth Causes of Action of the County's First Amended Complaint for Declaratory and Injunctive Relief on file in this action, and on the

Counterclaims of the City, SPON and AWG against the County as follows:

(a) Orange County Environmental Impact Report 508 and the related Environmental Impact Statement processed by the Federal Aviation Administration are hereby adjudged and decreed to be fully and legally adequate and complete under all provisions of the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000 *et seq.*), the State CEQA Guidelines (14 Cal.Admin.Code Section 15000 *et seq.*), the National Environmental Policy Act (42 U.S.C. Section 4321 *et seq.*), and all relevant or applicable federal implementing regulations for NEPA, for the project described in the EIS and EIR 508, as mitigated by the Board of Supervisors by their Resolutions 85-255, 85-1232, 85-1233, and as further mitigated by the terms and provisions of the parties' stipulation; and

(b) to the extent that the Fourth, Fifth or Sixth Causes of Action of the County's First Amended Complaint, or the counterclaims against the County in this action by the City, SPON and AWG raise any controversies other than the adequacy of EIR 508/EIS under the provisions of CEQA, NEPA and all relevant implementing regulations, such claims and controversies are hereby dismissed without prejudice.

2. The provisions of paragraphs 7 through 23, and 26 through 52 of the stipulation of the parties consenting to entry of this Judgment are hereby incorporated as part of this Judgment.

3. The County of Orange, the Orange County Board of Supervisors, the City of Newport Beach, Stop Polluting Our Newport, and the Airport Working Group shall each bear its own costs and attorneys' fees in connection with this litigation and the entry of this Judgment.

DATED: December 13, 1985 /S/

Honorable Terry J. Hatter, Jr.
United States District Judge

RESOLUTION OF THE BOARD OF SUPERVISORS OF ORANGE COUNTY, CALIFORNIA

August 27, 1985

On motion of Supervisor *Clark* duly seconded and carried, the following Resolution was adopted:

WHEREAS, John Wayne Airport ("JWA") is the only federally certificated commercial air carrier airport in Orange County, California; and

WHEREAS, the County of Orange, the City of Newport Beach, Stop Polluting Our Newport ("SPON") and the Airport Working Group ("AWG") have been engaged in substantial litigation in both state and federal courts since at least 1981, including litigation regarding a previous master plan for JWA (EIR 232; 1981) as well as the current JWA airport project (EIR 508; 1985); and

WHEREAS, the County has also been a defendant in numerous civil damage actions in the Orange County Superior Court since 1968, and continues to be such a defendant at the present time, where individuals residing to the south of JWA have claimed damage and injury to their persons and property alleged to be caused by the noise and other environmental effects of aircraft operations at JWA; and

WHEREAS, settlement discussions have recently occurred between the County, the City, SPON and the AWG which would, among other things, result in a complete termination of litigation between them arising under, or relating to, the provisions of the California Environmental Quality Act ("CEQA") in respect of various JWA related projects and would prevent future CEQA litigation related to, or other litigation or actions which might impede or obstruct implementation of the "EIR 508/EIS Project" ("the Project") (as defined in that certain "Stipulation for Entry of Final Judgment By Certain Settling Parties" to be filed in United States District Court (Central District of

California) Civil Action No. CV 85-1542 TJH (Mcx), a copy of which is attached as Exhibit "A" to Board of Supervisors' Resolution 85-1233); and

WHEREAS, the termination of this litigation would provide a substantial benefit to the County, its citizens, the residents of Santa Ana Heights who would benefit from implementation of the land use plan element of the EIR 508/EIS Project, and the air traveling public and other users of JWA, by ensuring prompt implementation of the Project; and

WHEREAS, during the settlement negotiations the City, SPON and AWG expressed the view that the existence of certain resolutions of this Board (Board of Supervisors' Resolutions 80-215 and 82-1542), which stated Board policy that there are no alternative commercial air carrier airport sites in Orange County, might act as substantial impediments to any possible future airport site review or selection efforts by interested third party private or public groups in Orange County; and

WHEREAS, there may be third party private or public groups interested in pursuing the possibility of additional or alternative airport sites at the present time, and the City, SPON and AWG have insisted as part of the proposed settlement that the efforts of such parties not be impaired by the existence of Resolutions 80-215 and 82-1542; and

WHEREAS, the Board of Supervisors recognized in its review and certification of EIR 508 that JWA is incapable of meeting the full level of air travel demand in Orange County and, in Resolutions 85-255 and 85-256, directed the Orange County Airport Commission to study prior reports of possible airport sites in Orange County to determine whether there are sites in Orange County which could act as *additional* airport sites in supplement to JWA to help meet a greater portion of the Orange County air travel demand, and to report the results of their efforts to the Board not later than November 31, 1985; and

WHEREAS, the County wishes to complete the proposed settlement with the City, SPON and AWG, and also wishes to facilitate the possible identification of an *additional* airport site, even if that effort is initially undertaken by third parties; and

WHEREAS, the County is willing to utilize its status as proprietor of JWA to cooperate in any legitimate third party site selection efforts by seeking to assist any such group in obtaining any state or federal funds which might be available for such additional site study efforts; and

WHEREAS, nothing in this resolution, or in the agreement of settlement with the City, SPON and AWG, requires the Board of Supervisors to relinquish in any way its future discretion with respect to its review, or any statement of its position regarding any additional or alternative airport site which might be selected by any such third party efforts undertaken in the future; and

WHEREAS, this Board, having been advised of the nature and status of possible future third party airport site selection efforts, finds them to be a fully adequate action and effort in substitution for the mitigation effort contemplated in Resolutions 85-255 and 85-256 in the form of the Airport Commission Study referred to and directed in those resolutions; and

WHEREAS, the City, SPON and AWG have authorized their counsel to execute and file with the respective courts the stipulations and proposed orders attached as Exhibits A through E to Board of Supervisors' Resolution 85-1233; and

WHEREAS, this Resolution is contingent upon the full execution, completion and acceptance by the respective Courts of the entire documentation of the settlement understanding of the parties as reflected in their respective resolutions and related documents.

NOW, THEREFORE, BE IT RESOLVED:

1. Board of Supervisors' Resolutions 80-215 and 82-1542 are hereby rescinded;

2. In the event any group or entity wishes to conduct a site selection or related study concerning an additional commercial airport to supplement the Project capacity of JWA, as such capacity has been determined by the terms of the relevant Board of Supervisors' resolutions, then:

(a) that group or entity shall present to the Airport Manager the study proposal;

(b) the Airport Manager shall promptly review and present the proposal, with his recommendation, to the Airport Commission;

(c) the Airport Commission shall then review the proposal and make its recommendation to the Board of Supervisors, with particular emphasis on whether the County, as proprietor of JWA, should seek to assist the proposed study effort by requesting the Federal Aviation Administration to make available AIP or equivalent federal funds available for such a study; and

(d) the proposal shall then be presented to the Board of Supervisors for its determination.

3. In the event such a proposal is approved, nothing in this resolution commits or requires the County to provide any local matching funds which might be required as a condition to a state or federal grant.

4. The Airport Commission study of additional sites, as specifically directed in Board of Supervisors' Resolutions 85-255 and 85-256, is discontinued immediately, and all related instructions to the Airport Commission are hereby rescinded.

5. Except for the action directed in the immediately preceding paragraph, nothing in this resolution amends in any way any provision of Board of Supervisors' Resolution

85-255 regarding the reasonableness or feasibility for CEQA purposes of any alternatives to the project evaluated in, or in connection with, EIR 508.

AYES: SUPERVISORS RALPH B. CLARK, THOMAS F. RILEY, ROGER R. STANTON, AND HARRIETT M. WIEDER

NOES: SUPERVISORS BRUCE NESTANDE

ABSENT: SUPERVISORS NONE

STATE OF CALIFORNIA
COUNTY OF ORANGE } ss.

I, LINDA D. ROBERTS, Clerk of the Board of Supervisors of Orange County, California, hereby certify that the above and foregoing Resolution was duly and regularly adopted by the said Board at a regular meeting thereof held on the 27th day of August, 1985, and passed by a *four-fifths* vote of said Board.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27th day of August, 1985.

/S/_____
LINDA D. ROBERTS
Clerk of the Board of Supervisors
of Orange County, California

McDERMOTT, WILL & EMERY
A Partnership Including Professional Corporations
111 West Monroe Street
Chicago, Illinois 60603-4067

312/372-2000

TELECOPIER 312/984-7700
TELEX 25-3565, 210079
CABLE MILAM

February 9, 1987

Office of the Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *The City of Irvine v. County of Orange, et al.*

To the Clerk:

In reviewing the petition for writ of certiorari in the above-entitled matter, we have discovered a passage that deserves clarification.

On page 7 of the petition there appears the following sentence, "As a result of the Settlement and Resolution No. 85-1231, the County will now sanction, assist and promote the development of El Toro MCAS as a commercial airport." This statement is the City's factual inference or interpretation, rather than a point appearing in the court record itself.

We believe it is a fair inference to make from the County's repeal of its earlier resolution opposing commercial airline use of El Toro without even notifying, or consulting with, the City of Irvine. Nonetheless, we did want to clarify that it was the City's inference.

Very truly yours,

/S/_____
John E. McDermott

JEM:pjb
cc: See Attached List
0714S

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COUNTY OF ORANGE,
Plaintiff,

vs.

AIR CALIFORNIA, ET AL.,
Defendants.

AND RELATED ACTIONS.

Honorable
Terry J. Hatter, Jr.
Judge Presiding

No. CV. 77-3261 TJH

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, OCTOBER 21, 1985

KATHY McCORMICK, CSR NO. 2172
CERTIFIED SHORTHAND REPORTER
438 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF COUNTY OR ORANGE:

GATZKE, LODGE & MISPAGEL
BY: MICHAEL SCOTT GATZKE
2890 PIO PICO DRIVE
SUITE E
CARLSBAD, CALIFORNIA 92008
(619) 729-2304

-AND-

ADRIAN KUYPER, COUNTY COUNSEL
OFFICE OF THE COUNTY COUNSEL
BY: DANIEL J. DIDIER
DEPUTY COUNTY COUNSEL
10 CIVIC CENTER PLAZA
SANTA ANA, CALIFORNIA 92702
(714) 834-3300

APPEARANCES OF COUNSEL (CONTINUED):

FOR DEFENDANT AIR CALIFORNIA:

IRELL & MANELLA
BY RICHARD M. SHERMAN, JR.
840 NEWPORT CENTER DRIVE
SUITE 500
NEWPORT BEACH, CALIFORNIA 92660
(714) 760-0991

FOR DEFENDANT AMERICAN AIRLINES, INC.:

SHEPPARD, MULLIN, RICHTER & HAMPTON
BY: MARK RIERA
333 SOUTH HOPE STREET
FORTY-EIGHTH FLOOR
LOS ANGELES, CALIFORNIA 90071
(213) 620-1780

FOR DEFENDANT AMERICA WEST AIRLINES, INC.:

LATHAM & WATKINS
BY: JOHN J. LYONS
555 SOUTH FLOWER STREET
SUITE 4600
LOS ANGELES, CALIFORNIA 90071 (213) 485-1234

FOR DEFENDANT JET AMERICA AIRLINES, INC.:

SKADDEN, ARPS, SLATE
MEAGHER & FLOM
BY: HARRIET POSNER
515 SOUTH FIGUEROA STREET
EIGHTEENTH FLOOR
LOS ANGELES, CALIFORNIA 90071
(213) 486-4600

FOR DEFENDANT PACIFIC SOUTHWEST AIRLINES:

ROGERS & WELLS
BY: MARY M. LOVIK
101 WEST BROADWAY
TWENTIETH FLOOR
SAN DIEGO, CALIFORNIA 92101
(619) 239-1200

APPEARANCES OF COUNSEL (CONTINUED):

FOR DEFENDANT WESTERN AIR LINES, INC.:

GEORGE H. KING
1925 CENTURY PARK EAST
SUITE 1250
LOS ANGELES, CALIFORNIA 90067
(213) 556-1155

FOR DEFENDANT MUSE AIR CORPORATION:

ROSENFELD, MEYER & SUSMAN
BY: BONNIE IVY BOGIN
9601 WILSHIRE BOULEVARD
SUITE 444
BEVERLY HILLS, CALIFORNIA 90210
(213) 858-7700

FOR DEFENDANT TRANS WORLD AIRLINES, INC.:

BELCHER, HENZIE, BIEGENZAHN & WALKER
BY: LINDA M. LANDRY
333 SOUTH HOPE STREET
SUITE 3650
LOS ANGELES, CALIFORNIA 90071
(213) 624-8293

FOR DEFENDANT UNITED AIRLINES, INC.:

PAUL, HASTINGS, JANOFSKY & WALKER
BY: ROBERT S. SPAN
FIFTH FLOOR
1229 OCEAN AVENUE
SANTA MONICA, CALIFORNIA 90401
(213) 451-2438

FOR DEFENDANT MC DONNELL DOUGLAS CORPORATION:

WENKE, TAYLOR, EVANS & IKOLA
BY: RAYMOND J. IKOLA
4000 MAC ARTHUR BOULEVARD
SUITE 540
NEWPORT BEACH, CALIFORNIA 92660
(714) 851-1001

APPEARANCES OF COUNSEL (CONTINUED):

FOR DEFENDANT AND COUNTERCLAIMANT CITY OF NEWPORT BEACH:

O'DONNELL & GORDON
BY: PIERCE O'DONNELL
JOSEPHINE POWE
619 SOUTH OLIVE STREET
SUITE 300
LOS ANGELES, CALIFORNIA 90014
(213) 688-1566

FOR DEFENDANTS AND COUNTERCLAIMANTS STOP POLLUTING OUR NEWPORT AND AIRPORT WORKING GROUP OF ORANGE COUNTY, INC.:

SHUTE, MIHALY & WEINBERGER
BY: E. CLEMENT SHUTE, JR.
396 HAYES STREET
SAN FRANCISCO, CALIFORNIA 94102
(415) 552-7272

FOR THE CITY OF IRVINE:

MEMEL, JACOBS, PIERNO,
GERSH & ELLSWORTH
BY: JOHN E. MC DERMOTT
1801 CENTURY PARK EAST
TWENTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90067
(213) 556-2000

LOS ANGELES, CALIFORNIA - MONDAY, OCTOBER 21, 1985
(OPEN COURT PROCEEDINGS COMMENCED AT 10:35 A.M.)

THE CLERK: ITEM NUMBER 30, CIVIL ACTION CV 85-1542, COUNTY OF ORANGE VERSUS AIR CALIFORNIA, ET AL.

COUNSEL, PLEASE MAKE YOUR APPEARANCES.

MR. IKOLA: GOOD MORNING, YOUR HONOR. RAYMOND IKOLA FOR MC DONNELL DOUGLAS.

THE COURT: THANK YOU.

MR. LYONS: GOOD MORNING, YOUR HONOR. JOHN LYONS FOR AMERICA WEST AIRLINES.

THE COURT: THANK YOU.

MR. O'DONNELL: GOOD MORNING, YOUR HONOR. PIERCE O'DONNELL AND JOSEPHINE POWE FOR THE CITY OF NEWPORT BEACH.

THE COURT: YES, THANK YOU.

MS. POSNER: GOOD MORNING, YOUR HONOR, HARRIET POSNER

THE COURT: KEEP YOUR VOICE UP, PLEASE.

MS. POSNER: HARRIET POSNER FOR DEFENDANT JET AMERICA.

THE COURT: THANK YOU, MS. POSNER.

MR. SPAN: ROBERT SPAN FOR UNITED AIRLINES.

THE COURT: THANK YOU.

MS. LANDRY: LINDA LANDRY FOR TWA.

MR. SHUTE: CLEMENT SHUTE FOR STOP POLLUTING OUR NEWPORT AND AIRPORT WORKING GROUP.

THE COURT: THANK YOU.

MR. DIDIER: DANIEL DIDIER, DEPUTY COUNTY COUNSEL FOR THE COUNTY.

THE COURT: THANK YOU.

MR. SHERMAN: RICHARD SHERMAN OF IRELL AND MANELLA FOR AIR CALIFORNIA.

THE COURT: THANK YOU.

MS. BOGIN: BONNIE BOGIN FOR MUSE AIR.

THE COURT: THANK YOU.

MR. KING: GOOD MORNING, YOUR HONOR. GEORGE KING FOR WESTERN.

THE COURT: THANK YOU, MR. KING.

MR. MC DERMOTT: JOHN MC DERMOTT FOR THE CITY OF IRVINE.

THE COURT: THANK YOU, MR. MC DERMOTT.

IT DOESN'T SEEM LIKE –

MS. LOVIC: MARY LOVIC FOR PACIFIC SOUTHWEST AIRLINES.

THE COURT: THANK YOU.

MR. RIERA: MARK RIERA ON BEHALF OF AMERICAN AIRLINES.

THE COURT: THANK YOU. I TAKE IT MR. MC DERMOTT WISHES TO BE HEARD.

I MEAN THIS DOESN'T SEEM LIKE A CASE THAT I HAVE KNOWN AND LOVED FOR SO MANY YEARS. WHERE IS MR. GATZKE? HE WORKS THE AFTERNOON SHIFT?

(LAUGHTER.)

THE COURT: THIS IS THE FIRST TIME I THINK I HAVE HAD YOU LADIES AND GENTLEMEN IN THE MORNING. WE USUALLY TAKE UP THE AFTERNOONS AND GO ON INTO THE EARLY EVENINGS.

ALL RIGHT.

MR. O'DONNELL: HE COULDN'T GET OUT OF THE AIRPORT IN ORANGE COUNTY.

THE COURT: TOUCHE.

(LAUGHTER.)

THE COURT: ALL RIGHT. MR. MC DERMOTT?

MR. MC DERMOTT: THANK YOU, YOUR HONOR. I THINK THE COUNTY'S ABSENCE IS OF SOME NOTABLE SIGNIFICANCE HERE BECAUSE THEY HAVE NOT OPPOSED THE MOTION TO INTERVENE AND ARE NOT HERE TO BE CALLED UPON TO ANSWER QUESTIONS ABOUT WHAT THEIR SILENCE MEANS.

SO I THINK THAT THE MOST CRITICAL PARTY WHO WOULD HAVE OCCASION TO OPPOSE THIS MOTION IS NOT HERE; AND THE SIGNIFICANCE OF THAT SHOULD BE NOTED.

IN TERMS OF THE MOTION TO INTERVENE WHICH WE HAVE FILED, I THINK IT BEARS SAYING AT THE OUTSET ONE THING. WHEN I WAS IN LAW SCHOOL I HAD A LAW PROFESSOR WHO WAS ALWAYS FOND OF SAYING THAT,

"IF YOU ALLOW HIM TO FRAME THE ISSUE

I WILL ALWAYS WIN THE ARGUMENT–HE WILL

ALWAYS WIN THE ARGUMENT."

AND JUDGING BY THE PAPERS FILED BY THE OPPOSING PARTIES TO THIS MOTION TO INTERVENE, THEY HAD THE SAME LAW PROFESSOR I DID, BECAUSE WHAT THEY HAVE DONE IN MANY INSTANCES IS TO RECHARACTERIZE THE INTERESTS, ARGUMENTS, PLEADINGS OF THE CITY OF IRVINE JUSTIFYING ITS MOTION TO INTERVENE.

PSA, FOR EXAMPLE, DECIDES AFTER READING OUR PLEADINGS THAT THE ONLY REAL INTEREST THAT IRVINE HAS IS IN CHALLENGING THE ENVIRONMENTAL DOCUMENTS UNDER CEQA AND THAT THE OTHER ISSUES RELATING TO THE ACCESS PLAN, RELATING TO THE COUNTY'S GENERAL PLAN, WHETHER THE ACTION THEY TOOK WAS CONSISTENT WITH THAT ARE SOMEHOW OR OTHER IRRELEVANT.

IN FACT, THEY GO THE NEXT STEP TO MAKE THE RIDICULOUS ARGUMENT THAT BECAUSE ONE OF THE TWELVE CLAIMS THAT WE RAISE IN OUR MOTION TO INTERVENE OR ANSWER, OR COUNTERCLAIM, MAY BE TIME-BARRED BY THE STATUTE OF LIMITATIONS.

WE SHOULD NOT BE PERMITTED TO INTERVENE IRRESPECTIVE OF WHETHER THERE ARE ELEVEN OTHER CLAIMS TO WHICH THERE WOULD BE NO STATUTE OF LIMITATIONS BARRED. IT IS AN ARGUMENT THAT I MUST CONFESS I DON'T UNDERSTAND.

NEXT, THE CITY OF NEWPORT BEACH, APPLYING THE DIVINING ROD TO OUR PLEADINGS, AND NO DOUBT BASED UPON A DOUBLE- BLIND, SCIENTIFIC RESEARCH EXPERIMENT, CONCLUDES THAT IRVINE'S ONLY INTEREST IS IN EL TORO; THEREBY EFFECTIVELY DISREGARDING ALL THE REST OF OUR PAPERS, ALL THE REST OF OUR CLAIMS THAT RELATE TO THE ACCESS PLAN, ENVIRONMENT DOCUMENTS, AND THE COUNTY GENERAL PLAN ISSUE.

MY POINT, YOUR HONOR, IS THAT THE EFFECT OF THESE PAPERS AND THESE ARGUMENTS IS TO DIVERT US FROM THE TRUTH, TO DIVERT US FROM THE FOUR REQUIREMENTS OF RULE 24 THAT DECIDE WHETHER OR NOT THERE SHOULD BE IN-

TERVENTION OR INTERVENTION IS APPROPRIATE.

AND MOST IMPORTANTLY, IT POINTS UP THE FACT THAT WE HAVE TO LOOK AT ALL THE CLAIMS THAT IRVINE HAS RAISED IN ITS ANSWER, AND AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS, NOT JUST ONE TAKEN OUT OF CONTEXT WITH RESPECT TO THE OTHERS, BUT THE ENTIRE PACKAGE.

AND WE HAVE TO JUDGE EACH OF THOSE CLAIMS IN LIGHT OF WHAT THE SPECIFIC REQUIREMENTS ARE UNDER RULE 24.

AND INDEED, IF THERE IS ONE CLAIM THAT WOULD JUSTIFY INTERVENTION THAT SHOULD BE THE END OF THIS MOTION, AND OTHER ISSUES RELATING TO ISSUES LIKE STANDING, STATUTE OF LIMITATIONS, RIPENESS, AND SO ON ARE REALLY BETTER ADDRESSED AFTER WE GET INTO THE LAWSUIT THROUGH MOTIONS TO DISMISS, MOTIONS FOR SUMMARY JUDGMENT, AND NOT IN THE CONTEXT OF A MOTION TO INTERVENE, UNLESS IT CAN BE DEMONSTRATED CLEARLY THAT ALL OF THE CLAIMS CAN SOMEHOW OR OTHER CAN BE DISPOSED OF THROUGH THOSE ARGUMENTS OR THROUGH ONE ARGUMENT THAT WOULD MAKE IT UNNECESSARY TO GO ON AND DEAL WITH THE OTHERS.

AND WITH THAT, LET ME TURN TO THE MOTION TO INTERVENE, ITSELF. I THINK THAT THERE CAN BE NO QUESTION THAT THE CITY OF IRVINE HAS AN INTEREST.

IT BORDERS JOHN WAYNE AIRPORT ON ONE SIDE AND EL TORO ON TWO OTHERS. AND I THINK ONE OF THE DIFFICULTIES AGAIN IN THE WAY ISSUES ARE FRAMED IS THAT THE CITY OF NEWPORT BEACH TALKS ABOUT THE CITY OF IRVINE'S UNDERLYING INTEREST OR PURPOSE OR OBJECTIVE

WITHOUT LOOKING AT WHAT THE RULES CALL FOR AS TO WHAT AN INTEREST IS.

IT IS NOT A SPECIFIC OR EQUITABLE INTEREST; IT'S AN INTEREST, THAT BECAUSE OF THE WAY AN ISSUE MIGHT IMPACT ON SOMEBODY, THAT GIVES THEM A RIGHT TO INTERVENE.

AND WE ARE CLEARLY SURROUNDED ON ALL SIDES BY AIRPORTS VIRTUALLY; AND HAD WE ATTEMPTED TO INTERVENE AT THE OUTSET OF THIS SUIT, I DON'T THINK ANYBODY COULD CLAIM THAT WE DID NOT HAVE AN INTEREST.

NO INTERVENTION OCCURRED AT THAT TIME BECAUSE WE FELT OUR INTERESTS WERE ADEQUATELY PROTECTED BY THE PARTIES WHO ARE NOW SETTLING THIS CASE; AND NOW THAT THEY ARE NO LONGER GOING TO BE INVOLVED IN THE CASE LITIGATING THE ISSUES THAT WE WOULD LITIGATE, IT MAKES IT IMPERATIVE FOR US TO INTERVENE.

AND I THINK THE CASES MAKE CLEAR THAT TIMELINESS FOR PURPOSES OF INTERVENTION IS JUDGED ON THE BASIS OF WHEN A PARTY FIRST CAME TO UNDERSTAND THAT ITS INTERESTS WERE NOT ADEQUATELY REPRESENTED BY THE PARTIES TO THE LAWSUIT.

I WOULD LIKE TO TURN TO ONE ISSUE.

THE COURT: LET ME INTERRUPT YOU FOR ONE MOMENT.

MR. MC DERMOTT: SURE.

THE COURT: I SEE THAT ANOTHER REPRESENTATION IS TO BE MADE.

MR. MC DERMOTT: CERTAINLY.

THE COURT: AN ADDITIONAL ADD?

(LAUGHTER.)

MR. GATZKE: YOUR HONOR, MY APOLOGIES FOR BEING LATE.

THE COURT: THAT'S ALL RIGHT. I WAS TOLD THAT YOU OPERATE THE AFTERNOON SHIFT HERE.

MR. O'DONNELL: WE ARE BOTH AT THE SAME TABLE; PUT MIKE RIGHT HERE (INDICATING).

(LAUGHTER.)

THE COURT: WOULD YOU MAKE YOUR REPRESENTATION FOR THE RECORD?

MR. GATZKE: YES. MY APOLOGIES TO COUNSEL AND THE COURT FOR BEING LATE, YOUR HONOR. MICHAEL GATZKE APPEARING ON BEHALF OF THE COUNTY OF ORANGE.

THE COURT: THANK YOU, MR. GATZKE.

MR. MC DERMOTT: LET ME TURN TO ONE CLAIM IN PARTICULAR –

THE COURT: GO AHEAD.

MR. MC DERMOTT: – BECAUSE IT IS A CLAIM THAT NONE OF THE OPPOSING PARTIES TO THIS MOTION ADDRESSED IN THEIR PAPERS, AND IT IS CRUCIAL.

ONE OF OUR COUNTERCLAIMS ALLEGES THAT THERE IS A CALIFORNIA GOVERNMENT CODE STATUTE THAT REGULATES LOCAL PLANNING AGENCIES IN TERMS OF THEIR GENERAL PLANS.

IT SAYS THAT UNTIL YOU GIVE NOTICE AND HOLD A PUBLIC HEARING YOU CANNOT AMEND YOUR GENERAL CLAIM.

AND IN ADDITION, ANOTHER STATUTE IN THE CALIFORNIA GOVERNMENT CODE MAKES CLEAR THAT IF A LOCAL AGENCY ACTS IN CONFLICT WITH ITS GOVERNMENT CODE THAT ACTION IS ILLEGAL.

OUR CONTENTION, AND THIS DOESN'T TURN IN

ANY WAY ON WHEN, IF EVER, SOMETHING WILL HAPPEN AT EL TORO DIRECTLY.

THIS IS A CLAIM THAT IS RIPE NOW: THAT THE COUNTY IN RESCINDING THE RESOLUTION RELATING TO EL TORO TOOK AN ACTION THAT WAS CONTRARY TO ITS GENERAL PLAN, A GENERAL PLAN THAT THE COUNTY, AS WELL AS THE CITY OF IRVINE, AS WELL AS DEVELOPERS, AS WELL AS CITIZENS BUYING HOMES HAVE RELIED ON FOR SEVERAL YEARS IN MAKING DECISIONS.

THEY'VE TAKEN AN ACTION THAT IS INCONSISTENT WITH THEIR GENERAL PLAN.

NONE OF THE PARTIES, NONE OF THE OPPOSING PARTIES EVER ADDRESSES THAT CLAIM. THEY SAY THAT OUR INTEREST IS IN THE ENVIRONMENTAL DOCUMENTATION, IN THE CEQA CLAIM. THEY SAY OUR SOLE INTEREST IS EL TORO IN SOME LARGE SENSE, BUT NOBODY ADDRESSES THAT CLAIM IN PARTICULAR.

THERE CAN BE NO QUESTION THAT IRVINE HAS AN INTEREST IN THAT ISSUE AS IT RELATES TO EL TORO AND THE COUNTY'S CHANGE IN POSITION. THERE CAN BE NO QUESTION OF TIMELINESS BECAUSE THE COUNTY RESCINDED THAT RESOLUTION ONLY AT THE END OF AUGUST AND WE INTERVENED IN EARLY SEPTEMBER.

THERE CAN BE NO QUESTION THAT IRVINE'S PARTICULAR INTEREST, BORDERED AS IT IS ON TWO SIDES BY EL TORO, ARE ADEQUATELY REPRESENTED BY THE PREVIOUS PARTIES TO THIS ACTION.

THERE CAN BE NO QUESTION THAT IF WE ARE NOT ALLOWED TO INTERVENE, IRVINE'S ABILITY TO RAISE ISSUES REGARDING THAT, ITS INTEREST IN THAT ISSUE, WILL BE IMPAIRED AND IMPEDED.

AND IN FACT, PROBABLY THE MOST DISPOSITIVE THING I COULD SAY IS THAT WERE THE COURT TO DENY OUR MOTION TO INTERVENE WHAT THE CITY OF IRVINE WOULD DO WOULD BE TO GO OUT THIS AFTERNOON AND FILE A COMPLAINT IN EITHER THE STATE COURT OR FEDERAL COURT RAISING EXACTLY THE SAME ISSUES.

THE ONLY ISSUE THAT ARGUABLY WE COULD NOT RAISE IN A SEPARATE SUIT, WHETHER IT BE A FEDERAL FORUM OR A STATE FORUM, ARE THE CEQA CLAIMS THAT ARGUABLY ARE BARRED BY THE STATUTE OF LIMITATIONS; IF WE WERE TO FILE IT SEPARATELY, AS OPPOSED TO INTERVENING, AND THROUGH THE RELATION BACK DOCTRINE WE WOULD BE ALLOWED TO CONTINUE TO ASSERT HERE.

OTHER THAN THAT SET OF CLAIMS, EVERYTHING ELSE THAT WE ALLEGE, WE COULD GO OUT AND FILE IN A SEPARATE SUIT.

AND IT THAT'S THE CASE, THEN IT SEEMS TO ME THAT WE HAVE – THE DENIAL OF THE MOTION WOULD BE TO DEFEAT EXACTLY WHAT THE COUNTY HAS ATTEMPTED TO ACCOMPLISH FROM THE OUTSET BY BRINGING THIS ACTION AS A PLAINTIFF, BY HAVING ALL THE PARTIES WHO HAVE DISPUTES INTO THIS COURTROOM.

AND NO DOUBT SOME OF THE OPPOSING PARTIES, IF WE WERE TO GO TO A SEPARATE FORUM, WOULD SAY TO US IN THAT CONTEXT:

> "WELL, WE WANT TO ENJOIN ANY PROCEEDING IN THESE OTHER FORUMS AS HAS ALREADY OCCURRED IN THIS ACTION."

SO THAT, IN EFFECT, THAT WOULD BE THE BEST OF ALL POSSIBLE WORLDS, IF YOU CAN PREVENT YOUR OPPONENT FROM INTERVENING

IN ONE ACTION AND THEN IN ANOTHER ACTION ENJOIN THAT ACTION FROM PROCEEDING BECAUSE EVERYTHING HAS BEEN CONSOLIDATED INTO THIS ONE.

YOU CAN'T HAVE IT BOTH WAYS IS OUR ARGUMENT.

THE COURT: WELL, LET ME ASK YOU THIS. IF YOU WERE ALLOWED TO INTERVENE IS IT THE CITY OF IRVINE'S POSITION THAT IT WOULD TAKE NO PART IN ONGOING MATTERS INVOLVING CEQA?

MR. MC DERMOTT: NO, THAT IS NOT OUR POSITION, YOUR HONOR.

THE COURT: IF I DENIED YOUR MOTION, THAT'S WHERE YOU WOULD BE.

MR. MC DERMOTT: THAT'S CORRECT.

THE COURT: SO THEN WHY SHOULD I NOT CONDITION YOUR INTERVENTION ON THAT?

MR. MC DERMOTT: THE COURT COULD DO THAT IF IT CHOSE, BUT I THINK OUR ARGUMENTS IN THE PAPERS INDICATE THAT SINCE THE PARTIES WHO, UP TO THIS POINT, HAVE BEEN MAKING THE SAME ARGUMENTS THAT THE CITY OF IRVINE WOULD MAKE WERE IT TO INTERVENE, SINCE THEY ARE SETTLING AND ELIMINATING THEMSELVES FROM THE CASE, ELIMINATING THOSE ISSUES FROM THE CASE, WE ARE ENTITLED UNDER THE CASE LAW THAT WE HAVE CITED, IN COMING IN IN THE WAY WE ARE, TO RELATE BACK TO THE POINT IN TIME WHEN THEY FILED THEIR CLAIMS WHICH WERE TIMELY AT THAT POINT.

THERE IS NO QUESTION IF I WENT TO STATE COURT OR FILED A SEPARATE FEDERAL COURT ACTION, THE STATUTE OF LIMITATIONS WOULD BAR THOSE CLAIMS. I AM NOT GOING TO CONTEST THAT.

BUT THERE IS CASE LAW TO THE EFFECT THAT IN SITUATIONS OF THIS SORT WHERE YOUR INTERESTS WERE ADEQUATELY REPRESENTED, AND WE CITE THESE CASES LIKE U.S. VERSUS MC DONALD AND A NUMBER OF OTHERS, WHERE LITERALLY YEARS AFTER THE PROCEEDING BEGAN AN INTERVENTION WAS PERMITTED TO RAISE ISSUES WHEN THE PARTIES WHO PREVIOUSLY HAD BEEN THOUGHT TO BE ADEQUATELY REPRESENTING THOSE INTERESTS SUDDENLY CHANGED THEIR POSITION, THEY DIDN'T TAKE AN APPEAL, THEY DIDN'T DO ONE THING OR ANOTHER THAT WOULD HAVE BEEN NECESSARY TO PROTECT THE INTERESTS OF AN ABSENT PARTY WHO THEN INTERVENED IN ORDER TO TAKE THE APPROPRIATE ACTION.

AND OUR ARGUMENT IS, ON THE BASIS OF THE CASES THAT WE HAVE CITED, THAT WE RELATE BACK TO THE POINT IN TIME WHEN THEY FILED THEIR CLAIM. SINCE THEY WERE TIMELY, WE ARE TIMELY. SINCE WE STAND IN THEIR SHOES NOW, THAT THEY ARE REMOVING THEMSELVES AS LITIGANTS ON THOSE ISSUES, AND WE ARE TAKING THEIR PLACE.

IN ADDITION, THE PURPOSE OF THE STATUTE OF LIMITATIONS RELATING TO CEQA IS TO GIVE NOTICE TO THE COUNTY OF ALL WHO OPPOSE.

WHAT THE COUNTY HAS DONE IS MAKE THE STATUTE OF LIMITATIONS ISSUE IRRELEVANT, BECAUSE WHAT IT DID WAS JUMP THE GUN IN A SENSE.

INSTEAD OF WAITING FOR PEOPLE TO SUE IT, WHAT IT DID WAS BRING THIS ACTION FOR DECLARATORY RELIEF, BASICALLY SAYING:

> "WE WANT ANYBODY WHO HAS A PROBLEM TO COME BEFORE THE COURT. WE WANT TO

RESOLVE IT ALL IN ONE PROCEEDING."

AND THEREBY, WHAT IT DID IS THAT INSTEAD OF THE MATTER BEING IN ISSUE ONLY INSOFAR AS OPPOSING PARTIES WHO MIGHT SUE IT MIGHT RAISE THOSE ISSUES, IT PUT EVERYTHING IN ISSUE. SO THERE IS NO PREJUDICE TO THE COUNTY.

AND I THINK THOSE TWO FACTORS, THE RELATION BACK DOCTRINE AND THE WAY THAT THE COUNTY HAS BROUGHT THIS CASE IN A MANNER THAT I THINK MAKES THE STATUTE OF LIMITATIONS ISSUE IRRELEVANT, IS SUCH THAT IT ENTITLES US TO INTERVENE NOT ONLY WITH RESPECT TO THE ACCESS PLAN ISSUES AND THE GENERAL PLAN ISSUES, BUT TO THE CEQA CLAIMS AS WELL.

SO WHILE ON THE ONE HAND THERE'S NO DOUBT IF WE WENT TO ANOTHER FORUM OR FILED A SEPARATE SUIT WE WOULD BE BARRED, WE BELIEVE WE ARE STEPPING INTO THE SHOES OF PARTIES WHO ARE, ON THE BASIS OF THE ARGUMENTS THAT THEY MADE IN THEIR PLEADINGS MAKING THE SAME ARGUMENTS THAT WE ARE MAKING NOW, OR THAT WE WOULD ASK THIS COURT TO PERMIT US TO INTERVENE TO ENABLE US TO MAKE.

AND FOR THAT REASON, BY RELATING BACK, WE DO NOT BELIEVE THAT THERE IS ANY STATUTE OF LIMITATIONS PROBLEM.

THE COURT: ARE YOU ASKING TO INTERVENE AS A MATTER OF RIGHT, OR ARE YOU ASKING THE COURT TO EXERCISE ITS DISCRETION TO ALLOW INTERVENTION?

MR. MC DERMOTT: I THINK IN OUR PAPERS, YOUR HONOR, WE ASK FOR INTERVENTION ON BOTH GROUNDS.

WE BELIEVE THAT WE ARE ENTITLED TO INTERVENE AS OF RIGHT AS TO ALL OF THE ISSUES. SHOULD THERE BE ANY QUESTION IN THAT REGARD, WE ALSO MADE THE REQUEST FOR PERMISSIVE INTERVENTION.

I THINK ITS ALSO USEFUL HERE, SINCE TIMELINESS SEEMS TO BE THE ISSUE THAT ALL THE PARTIES IN THEIR PAPERS FOCUSED THE MOST ATTENTION ON, TO LOOK AT WHAT THE PRIMARY MEASURE OF THE TIMELINESS REQUIREMENT IS UNDER THE FEDERAL CASES.

THEY CITE THREE DIFFERENT FACTORS, BUT THE ONE THAT IS THE MOST CONTROLLING IS THE PREJUDICE TO OTHER PARTIES, UNLIKE THE CASE WHICH NEWPORT CITES, THE ONE OF NAACP, WHERE AN ITERVENTION WAS SOUGHT AFTER A CONSENT JUDGMENT HAD BEEN – A SUMMARY JUDGMENT HAD BEEN ENTERED.

THAT WAS A CASE WHERE THERE WAS AN ELECTION COMING UP AND A LOT WOULD TURN ON WHETHER YOU USED TEN-YEAR-OLD CENSUS DATA OR NEW CENSUS DATA, WHICH NEW YORK WAS ATTEMPTING TO HAVE CONSIDERED.

THERE WAS A SITUATION THERE WHERE CLEARLY PREJUDICE WOULD APPLY AND THE COURT SAID, "WE'RE NOT GOING TO HOLD UP THE WORKS BECAUSE OF THIS INTERVENTION."

WHAT ARE WE HOLDING UP HERE? WHAT IS THE PREJUDICE TO THE OPPOSING PARTIES?

THERE'S GOING TO CONTINUE TO BE A LITIGATION. NEWPORT BEACH TELLS US IN ITS PAPERS THAT THERE IS GOING TO BE ALL THESE THINGS THAT ARE GOING TO HAPPEN BEFORE THERE ARE ANYTHING THAT RELATES TO EL TORO EVER COMES TO ANY FRUITION.

THERE WILL BE A TRIAL IN THIS COURTROOM PRESUMABLY SOMETIME WITHIN THE NEXT YEAR, HOPEFULLY, WITH RESPECT TO THE REMAINING PARTIES WHO HAVE NOT SETTLED.

THERE ISN'T ANYTHING THAT IS ABSOLUTELY GOING TO DIE IF – IS GOING TO BE IRREVOCABLE SOMEHOW IF OUR INTERVENTION IS PERMITTED.

THE COURT: WHAT ABOUT THE PREJUDICE TO THE COUNTY?

MR. MC DERMOTT: THE PREJUDICE TO THE COUNTY?

THE COURT: YES.

MR. MC DERMOTT: THE COUNTY DID NOT FILE OPPOSING PAPERS. THE COUNTY, AND I DON'T THINK THEY COULD, CONSISTENT WITH THE POSITION THEY TOOK IN THEIR COMPLAINT, WHERE THEY NAMED "JOHN DOES" AND SAY, "WE WANT EVERYBODY WHO IS INTERESTED IN THIS PROCEEDING TO COME BEFORE THE COURT."

IF THEY OPPOSED IT, IF THEY FELT PREJUDICED, WHY HAVE THEY NOT FILED OPPOSING PAPERS?

MAYBE MR. GATZKE, SINCE HE'S HERE, CAN ANSWER THAT QUESTION NOW.

THE COURT: ARE YOU SUGGESTING NONE OF THE SETTLING PARTIES WOULD BE PREJUDICED?

MR. MC DERMOTT: NONE OF THE SETTLING PARTIES WOULD BE PREJUDICED?

THE COURT: YES.

MR. MC DERMOTT: I DON'T SEE HOW THE POINT IN TIME HERE – WHAT ARE WE TALKING ABOUT IS A TIMING PROBLEM MORE THAN ANYTHING ELSE.

I MEAN, IT'S NOT AS IF ANYTHING IS IRREVOCABLE, AS IF THEIR ABILITY TO PROTECT

THEIR INTEREST HAS BEEN IN ANY WAY BEEN IMPAIRED.

BUT THEY AREN'T GOING TO BE ABLE TO MAKE THEIR ARGUMENTS THAT IF OUR ARGUMENTS WERE TO BE PRESENTED TO THE COURT AND REJECTED, HOW WOULD THEY BE IN ANY DIFFERENT POSITION A YEAR FROM NOW, IF THAT'S THE COURT'S RULING, THAN THEY ARE RIGHT NOW?

AND THAT TO ME IS THE ESSENCE OF PREJUDICE. IN THE NEW YORK CASE THERE WAS AN ELECTION. YOU CAN'T CHANGE THE TIMING OF AN ELECTION.

THERE IS NOTHING HERE THAT APPROACHES THE IMPORTANCE OF AN ELECTION. THERE ISN'T ANYTHING THAT IS GOING TO HAPPEN TOMORROW BUT FOR WHICH THIS INTERVENTION WOULD PREVENT.

THERE IS NO PREJUDICE THAT I CAN SEE OTHER THAN A MATTER OF TIMING, AND EVEN AS TO THAT, THE TIMING IT SEEMS TO ME IS NOT SO SIGNIFICANT THAT IS SHOULD WARRANT THE COURT DENYING THE MOTION TO INTERVENE.

IN FACT, THE CASES WHICH DEAL WITH INTERVENTION TEND TO FOCUS QUITE A BIT – U.S. VERSUS OREGON IS A GOOD EXAMPLE. LEGAL AID SOCIETY IS ANOTHER ONE. THE COUNTY OF FRESNO VERSUS ANDERS IS ANOTHER WHERE A LOT OF THE CONSIDERATION HAD TO DO WITH SOME NEW PHASE OF THE LITIGATION, SOMETHING NEW HAD HAPPENED THAT MADE IT APPROPRIATE AT THAT PARTICULAR POINT TO PERMIT INTERVENTION.

THIS IS NOT THE SAME CASE THAT CAME INTO THIS COURTROOM IN MARCH OR APRIL

OR WHENEVER IT WAS FILED. WHAT HAS HAPPENED SINCE THEN IS THAT THERE HAS BEEN A SETTLEMENT AGREEMENT ADOPTED, THERE HAS ALSO BEEN A WHOLE SERIES OF RESOLUTIONS ADOPTED, AND THERE WOULD NOT BE A SETTLEMENT AGREEMENT UNLESS THE COUNTY HAD AGREED TO RESCIND THE RESOLUTIONS RELATING TO EL TORO.

THAT CHANGES RADICALLY IRVINE'S VIEW OF THE WHOLE THING. YOU CANNOT SEPARATE THE ENVIRONMENTAL CLAIMS AND THE ACCESS CLAIMS OVER HERE AND ON THE ONE HAND TREAT THE EL TORO ISSUE AS SOMETHING AND THE RESOLUTIONS RESCINDING THE EARLIER EL TORO RESOLUTIONS AS SOMETHING ENTIRELY SEPARATE.

FOR EXAMPLE, HAD THE ACCESS PLAN AND THE COUNTY'S APPROACH BACK IN FEBRUARY WHEN THEY ADOPTED WHAT WE WERE GOING TO DO, HAD THEY SAID AT THAT TIME:

> "WE ARE GOING TO HAVE THESE CAPS ON LIMITATIONS ON JOHN WAYNE AIRPORT AND WE ARE GOING TO CHANGE OUR MIND ABOUT EL TORO OR AT LEAST TAKE A NEUTRAL POSTURE AND ALLOW FURTHER CONSIDERATION OF IT";

IRVINE WOULD HAVE INTERVENED AT THAT PONT AND THE REASON THEY WOULD HAVE INTERVENED IS BECAUSE IRVINE CAN'T DEAL WITH A SITUATION WHERE ON THE ONE HAND WE ARE GOING TO REOPEN CONSIDERATION OF EL TORO, WHILE FOR THE NEXT TWENTY YEARS CONSIDERATION OF ANY FURTHER EXPANSION OF JOHN WAYNE AIRPORT IS EXCLUDED BECAUSE WE MADE A SEPARATE DEAL.

OBVIOUSLY, WE ARE GOING TO TAKE AN EN-

TIRELY DIFFERENT VIEW OF THE JOHN WAYNE AIRPORT SITUATION REALIZING HOW THE TWO OF THOSE SO CLOSELY INTERRELATE WITH EACH OTHER.

UP UNTIL AUGUST WE THOUGHT WHAT WE WERE DEALING WITH WAS A JOHN WAYNE AIRPORT ISSUE. THAT'S WHAT THE PROJECT WAS; THAT'S WHAT THE ENVIRONMENTAL DOCUMENTATION RELATED TO.

THERE WAS TALK ABOUT EL TORO. BUT IRVINE FELT COMFORTABLE AND SECURE BECAUSE OF THE EXISTENCE OF A RESOLUTION BY THE COUNTY BOARD OF SUPERVISORS THAT SAYS,

> "WE DON'T WANT ANY FURTHER JOINT MILITARY-CIVILIAN USE OF EL TORO."

FOR THAT REASON, SINCE THE CITY OF NEWPORT BEACH AND CITIZENS' GROUPS WERE RAISING THE SAME ISSUES THAT WE WOULD HAVE RAISED HAD WE INTERVENED, WE DECIDED THERE IS NO REAL COMPELLING INTEREST THAT WOULD WARRANT US INTERVENING. NOW THE ENTIRE PICTURE HAS CHANGED.

THE COURT: I UNDERSTAND.

MR. MC DERMOTT: AND FOR THAT REASON BECAUSE THERE ARE – THERE IS SOMETHING NEW THAT HAS HAPPENED, I THINK THAT YOU CAN'T LOOK AT INTEREST AND WHAT IT WAS SIX MONTHS AGO.

YOU HAVE TO LOOK AT IT NOW, BECAUSE THE CONDITIONS HAVE CHANGED. AND IRVINE AS SOON AS IT BECAME AWARE THAT ITS INTERESTS WERE NOT GOING TO BE ADEQUATELY PROTECTED MOVED QUICKLY TO FIND COUNSEL AND TO INTERVENE IN THIS LITIGATION, AND I THINK THE TIMELINESS ISSUE IS TO BE RESOLVED IN

REFERENCE TO THE COUNTY'S ADOPTION OF THE RESOLUTIONS AT THE END OF AUGUST, NOT AT THE TIME THAT THE LAWSUIT WAS FILED.

THE COURT: ALL RIGHT. FINE. LET ME HEAR FROM SOMEONE IN OPPOSITION.

AND AGAIN, LET ME REMIND COUNSEL THAT YOU SHOULD REPEAT YOUR REPRESENTATIONS WHENEVER YOU FEEL COMPELLED TO SPEAK TO THAT THE REPORTER HAS SOME IDEA OF WHAT IS GOING ON HERE.

AND I WOULD APPRECIATE IT IF YOU WOULD ADDRESS YOURSELF MORE TO A PERMISSIVE INTERVENTION THAN TO INTERVENTION AS A RIGHT.

I FRANKLY DON'T FEEL THAT THE REQUIREMENTS FOR THE INTERVENTION AS A RIGHT HAVE BEEN MET, BUT I HAVE A STRONG FEELING THAT THE CITY OUGHT TO BE ALLOWED TO INVOLVE ITSELF WITH ITS CITIZENS HAVING THE KIND OF INTERESTS WHICH HAVE BEEN DESCRIBED HERE, BOTH IN THE MOVING PAPERS AS WELL AS THE OPPOSITION. GO ON.

MS. POWE: GOOD MORNING, YOUR HONOR. I AM JOSEPHINE POWE FROM O'DONNELL AND GORDON REPRESENTING THE CITY OF NEWPORT BEACH.

THE COURT: GOOD MORNING.

MS. POWE: I AGREE WITH MR. MC DERMOTT THAT HAD HE COME HERE AND ASKED TO INTERVENE AT THE OUTSET OF THIS LAWSUIT THAT THE CITY OF NEWPORT BEACH WOULD HAVE WELCOMED ITS SISTER CITY IN THIS LAWSUIT.

THE CITY OF NEWPORT BEACH OPPOSES THIS BELATED ATTEMPT BY IRVINE TO INTERJECT ITSELF HERE.

THE PERMISSIVE INTERVENTION AS WELL AS INTERVENTION OF RIGHT, OF COURSE, REQUIRES TIMELINESS. AND THIS INTERVENTION MOTION IS SIMPLY NOT TIMELY.

IT COMES, AS THIS COURT KNOWS, AFTER YEARS OF PROTRACTED LITIGATION BETWEEN THE CITY OF NEWPORT BEACH, THE COUNTY OF ORANGE, THE STOP POLLUTING OUR NEWPORT, AND AIRPORT WORKING GROUP.

AND AS THIS COURT IS AWARE OVER THE LAST SIX MONTHS THESE PARTIES HAVE BEEN ENGAGED IN SERIOUS SETTLEMENT NEGOTIATIONS.

THOSE NEGOTIATIONS HAVE ALL BEEN TAKING PLACE IN THE PUBLIC EYE. THEY HAVE BEEN DIFFICULT NEGOTIATIONS. THEY HAVE BEEN PROTRACTED. THEY HAVE BEEN POLITICALLY SENSITIVE.

AND THIS, YOUR HONOR, IS THE PREJUDICE INVOLVED HERE. THESE PARTIES HAVE WORKED OUT A DELICATE SETTLEMENT THAT IS IN THE PUBLIC INTEREST.

IRVINE NOW WANTS TO JUMP IN THIS LAWSUIT AND SAY:

> "WAIT A MINUTE. WE DON'T LIKE EXACTLY WHAT YOU NEGOTIATED."

THE PREJUDICE FROM THAT IS OBVIOUS. THE SETTLEMENT IS AN HISTORIC ONE, IT IS ONE THAT FAIRLY ACCOMMODATES THE INTERESTS OF THESE SETTLING PARTIES.

MR. MC DERMOTT FIRST TELLS YOU THAT ITS INTEREST IS NOT SOLELY EL TORO, THAT IT HAS AN INTEREST IN THE ENVIRONMENTAL CLAIMS THAT WERE RAISED IN THIS LAWSUIT BY THE CITY OF NEWPORT BEACH AND THE HOMEOWNERS GROUPS.

THE PROBLEM WITH THAT ARGUMENT IS THAT IF YOU LOOK AT THE ONE DOCUMENT THAT TRULY TELLS US WHAT THE CITY OF IRVINE'S INTERESTS ARE, ITS COUNTERCLAIM WE KNOW FROM THAT DOCUMENT THAT THE ALLEGATIONS THAT IT INTENDS TO MAKE IF ALLOWED INTO THIS LAWSUIT RELATE TO EL TORO.

IF YOU LOOK AT PARAGRAPH 122 OF THEIR COUNTERCLAIM, WHICH IS THE PARAGRAPH WHERE THE CITY OF IRVINE TELLS YOU WHY IT BELIEVES ENVIRONMENTAL IMPACT REPORT 508 IS INADEQUATE, YOU WILL NOTE THAT EIGHT OF THE ELEVEN REASONS THAT IT LISTS SPECIFICALLY DIRECT THEMSELVES TO EL TORO. 5.

OF COURSE, EIR-508 DOES NOT ADDRESS THE MITIGATION MEASURES THAT COULD BE IMPLEMENTED FOR ENVIRONMENTAL IMPACTS ASSOCIATED WITH EL TORO, BECAUSE EIR-508 IS NOT ABOUT EL TORO. IT'S ABOUT JOHN WAYNE AIRPORT.

AND THE CITY OF IRVINE WANTS TO COME IN THIS LAWSUIT AND TALK TO YOU ABOUT EL TORO. MR. MC DERMOTT HAS ADMITTED THAT IT IS EL TORO THAT – IT IS THE RESCISSION, THE COUNTY'S RESCISSION OF THE RESOLUTION RELATING TO ITS PREVIOUS ACTIVE OPPOSITION OF EL TORO THAT MADE IT AWARE THAT ITS INTERESTS MAY NOT BE PROTECTED IN THIS LAWSUIT.

WE KNOW FROM THE TIMING OF WHEN MR. MC DERMOTT CAME INTO THIS COURT TO ASK THE CITY OF IRVINE INTERVENE THAT THE ONLY INTEREST IT HAS IS PROTECTING EL TORO.

BUT THAT IS A POLITICAL DISPUTE THAT THE CITY OF IRVINE MAY HAVE WITH THE COUNTY. AND THIS COURT SHOULD NOT BE USED AS AN

ARENA FOR THE CITY OF IRVINE TO TALK ABOUT ITS POLITICAL DISPUTE WITH THE COUNTY; AND IT CERTAINLY SHOULD NOT BEING ALLOWED, GIVEN THE PREJUDICE THAT WOULD FLOW FROM THAT TO THE SETTLING PARTIES HERE, THE CITY OF NEWPORT BEACH, THE HOMEOWNERS GROUPS, AND THE COUNTY WHO HAVE DILIGENTLY OVER THE LAST SIX MONTHS WORKED OUT THIS SETTLEMENT.

THE FEDERAL AVIATION ASSOCIATION HAS NOW APPROVED IT. WE ARE WAITING FOR THE FINAL DOCUMENTATION TO COME TO THIS COURT AND PRESENT IT WITH THE SETTLEMENT SO THAT THE CEQA CLAIMS IN THIS CASE, THE ISSUES THAT THE CITY OF THE NEWPORT BEACH AND THE HOMEOWNERS HAVE BEEN ARGUING ABOUT FOR YEARS WILL BE GONE.

THE ACCESS PLAN ISSUES AND OTHER RELATED ISSUES THAT THE CITY OF IRVINE TRIES TO RAISE I THINK WE HAVE ADEQUATELY BRIEFED IN OUR PAPERS.

THOSE ISSUES – THEY DON'T HAVE STANDING TO RAISE THOSE ISSUES. THEY ARE NOT AN AIRLINE. THEY DON'T HAVE ANY PERSONAL STAKE IN THE OUTCOME OF THOSE ISSUES, AND IN ANY EVENT THEY WOULD BE ADEQUATELY REPRESENTED, BECAUSE AGAIN IF YOU LOOK TO THEIR COUNTERCLAIM YOU SEE WHAT THEY HAVE ALLEGED IN THEIR COUNTERCLAIM ARE THE IDENTICAL ARGUMENTS THAT HAVE ALREADY BEEN ALLEGED BY THE AIRLINES IN THIS CASE.

I REQUEST THAT THE COURT DENY THE MOTION TO INTERVENE BOTH AS A RIGHT AND UNDER PERMISSIVE INTERVENTION.

THE COURT: THANK YOU. ANYONE ELSE WISH TO BE HEARD?

MR. SHUTE: I AM CLEMENT SHUTE REPRESENTING STOP POLLUTING OUR NEWPORT AND THE AIRPORT WORKING GROUP, YOUR HONOR.

THE COURT: YES.

MR. SHUTE: RULE 24(B) CONTAINS THE SAME CONCERN THAT THERE NOT BE PREJUDICE TO EXISTING PARTIES AS IS A FACTOR IN TIMELINESS.

SO EVEN THOUGH THE COURT IS MORE INTERESTED IN PERMISSIVE INTERVENTION, I THINK THE PREJUDICE FACTOR IS STILL A STRONG ONE, PARTICULARLY FOR THIS REASON: THERE IS NO OTHER PARTY TO THE CASE OTHER THAN THE CITY AND THE TWO HOMEOWNERS GROUPS WHICH HAVE CHALLENGED THE ADEQUACY OF THE ENVIRONMENTAL DOCUMENT UNDER THE STATE LAW.

THAT IS SETTLED AND THE SETTLEMENT THAT – WOULD BE PRESENTED TO THE COURT; THAT WOULD THEN BECOME AN ISSUE THAT WOULD BE LITIGATED BY THE CITY OF IRVINE BEFORE THE COURT COULD CONCEIVABLY UPSET THE SETTLEMENT IF THE COURT'S RULING WERE ADVERSE TO THE TERMS OF THE SETTLEMENT AT A LATER POINT. IF THAT ISN'T PREJUDICE, I DON'T KNOW WHAT IS.

AND SECONDLY, THE COURT INDICATED AT AN EARLIER POINT IT MIGHT BE INTERESTED IN CONDITIONING THE TERMS OF INTERVENTION.

IF THE COURT WERE STILL INCLINED TO ALLOW INTERVENTION AT ALL, I WOULD ASK THAT INTERVENTION BE CONDITIONED ON NOT RAISING CEQA ISSUES WHICH HAVE BEEN EXPRESSLY SETTLED BY THE ONLY PARTIES WHICH BROUGHT THOSE ISSUES – HAD THOSE ISSUES BEFORE THE COURT; AND ALSO THAT THE COURT CONSIDER

NOT ALLOWING THE ACCESS PLAN ISSUES TO BE RAISED BY IRVINE, AS THE AIR CARRIERS AND MC DONNELL-DOUGLAS ARE ALREADY PRESENTING THOSE ISSUES TO THE COURT AND HAVE EVERY REASON TO CONTINUE DOING SO.

THANK YOU.

THE COURT: THANK YOU. YES?

MR. GATZKE: YES. GOOD MORNING, YOUR HONOR. MICHAEL GATZKE FOR THE COUNTY OF ORANGE.

JUST BRIEFLY, IT IS CORRECT THAT THE COUNTY DID NOT FILE ANY WRITTEN OPPOSITION TO THE MOTION. WE DIDN'T FILE ANY NONOPPOSITION STATEMENT EITHER.

I THINK WHAT I WOULD LIKE TO DO IS JUST LIMIT MYSELF TO COMMENTING BRIEFLY ON A COUPLE OF THINGS I HEARD COUNSEL SAY THIS MORNING AND A COUPLE OF THINGS THAT I READ, I BELIEVE, FOR THE FIRST TIME IN THE REPLY BRIEF THAT IRVINE FILED THIS PAST WEEK.

I THINK THERE HAS BEEN A CHANGE IN IRVINE'S POSITION THAT DOES CAUSE ME SOME CONCERN THAT I MIGHT NOT HAVE ORIGINALLY FELT WHEN I FIRST SAW THE MOTION TO INTERVENE BUT I THINK ARE PERTINENT TO THE QUESTION OF PERMISSIVE INTERVENTION.

WITH RESPECT TO THE QUESTION OF PREJUDICE AND THE PREJUDICE THAT THE COUNTY MIGHT SUFFER TO THE EXTENT THAT THE CITY OF IRVINE RAISES CAUSES OF ACTION ATTACKING THE ACCESS PLAN I SUPPOSE THE ONLY PREJUDICE IS THAT THOSE ALLEGATIONS SEEM TO BE EVEN SOMEWHAT MORE RADICAL THAN THE MOST RADICAL AIRLINE POSITION I HAVE YET SEEN DURING THE HISTORY OF

THESE CASES, AND YET THEY PERHAPS DO NOT MATERIALLY EXPAND THE ISSUES THAT ARE ALREADY BEING RAISED BY THE AIRLINES.

IT IS I THINK, PARENTHETICALLY, INTERESTING THAT IN THE SAME COMPLAINT THE CITY OF IRVINE COULD ALLEGE THAT IT IS ILLEGAL AND UNCONSTITUTIONAL FOR THE COUNTY TO RESTRICT THE USE OF JOHN WAYNE AIRPORT IN ANY FASHION AND THEN TURN AROUND AND SAY THERE TODAY THAT WHAT THEY WANT TO DO IS CHALLENGE THE ADEQUACY OF AN ENVIRONMENTAL IMPACT REPORT ON THE COUNTY'S DISCRETIONARY DECISION TO EXPAND OPERATIONS AT JOHN WAYNE AIRPORT, OR CONVERSELY, TO LIMIT.

TO THE EXTENT THAT THE CITY OF IRVINE WANTS TO RAISE PENDENT CLAIMS REGARDING THE GENERAL PLAN PROVISIONS OF THE GOVERNMENT CODE I DON'T CONTEND THAT THE COUNTY HAS ANY PARTICULAR PREJUDICE, AND GIVEN OUR PAST POSITION I AM NOT EVEN ADVERSE TO HAVING THEM PRESENT IN THIS FORUM. IT IS, OF COURSE, A PLEASURE TO CONSIDER THOSE PENDENT CLAIMS.

I'M GOING TO MODIFY PERHAPS SLIGHTLY THE POSITION TAKEN BY NEWPORT BEACH, SPON, THE AIRPORT WORKING GROUP.

THE RESOLUTION THAT IRVINE COMPLAINS OF IS RESOLUTION 851231, A VERY SHORT RESOLUTION THAT RESCINDED TWO PRIOR RESOLUTIONS TO THE EXTENT THAT THE CITY OF IRVINE WANTS TO MAKE CEQA CLAIMS DIRECTED SOLELY AT THAT RESOLUTION.

IT IS PERHAPS A NEW ISSUE AND PERHAPS NOT PREJUDICIAL TO LET THEM INTERVENE TO CHALLENGE THAT. BUT WHAT CONCERNS ME, YOUR

HONOR, AND WHAT I THINK IS SUBSTANTIALLY PREJUDICIAL, IS THE FOR THE CITY OF IRVINE TO BE PERMITTED TO COME IN AT THIS LATE DATE AND CHALLENGE WITH FULL BREADTH THAT, THE ADEQUACY OF EIR-508, AND ADDRESS ALL OF THE ISSUES REGARDING THE JOHN WAYNE AIRPORT MASTER PLAN.

AND THE PREJUDICE IS SIMPLY THIS: WHEN WE FILED OUR DECLARATORY RELIEF COMPLAINT IN MARCH IT WAS, AS COUNSEL HAS CHARACTERIZED IT, PERHAPS, AN INVITATION TO INTERESTED PARTIES.

BUT I THINK THE COURT SHOULD BE AWARE AND PROBABLY IS AWARE THAT UNDER CALIFORNIA LAW I COULD NOT NAME THE CITY OF IRVINE AS A "DOE."

I ALLEGED CONTROVERSIES, AND MY DUTIES IN PLEADING WOULD HAVE BEEN TO JOIN ALL PERSONS THAT I KNEW AT THAT TIME HAD AN ACTIVE CONTROVERSY WITH THE COUNTY ON THE SUBJECT MATTER OF THE COMPLAINT; AND I TRUTHFULLY DID NOT INCLUDE THE CITY OF IRVINE BECAUSE I HAD NO REASON TO BELIEVE AT THAT TIME THAT THE CITY OF IRVINE WITH WHOM I'M CERTAINLY AWARE HAD A CONTROVERSY WITH THE COUNTY WITH RESPECT TO THE FULL BREADTH OF THE EIR-508.

IF THAT WAS WRONG, IF THE CITY OF IRVINE WISHED TO CHALLENGE THE FULL BREADTH OF THE EIR-508 AT THAT TIME THEY SHOULD HAVE INTERVENED THEN.

NOTHING HAS CHANGED THERE EXCEPT RESOLUTION 1231. PERHAPS ON THAT ISSUE A CHALLENGE CAN BE PRESENTED.

THE PREJUDICE IS THAT THE COUNTY HAS

GONE THROUGH A GREAT DEAL OF EFFORT, AGONY, TOIL, EXPENSE TO NEGOTIATE WITH ITS HISTORICAL ANTAGONISTS ON THE ENVIRONMENTAL ISSUES, CITY OF NEWPORT BEACH AND THE HOMEOWNERS' GROUPS, TO COORDINATE ALL OF THAT NEGOTIATION WITH THE FEDERAL GOVERNMENT, TO REACH A RESOLUTION THAT ALL OF THOSE PARTIES ARE SATISFIED WITH.

WHAT THE COUNTY GOT FOR THAT WAS THE ABILITY TO PROCEED WITH THE PROJECT CONSIDERED BY 508 AND SPECIFICALLY TO BUILD A NEW TERMINAL BUILDING THAT WAS SO DESPERATELY NEEDED, TO BUILD THE NEW RUNWAYS AND TAXI-WAYS OR IMPROVEMENTS FOR THOSE FACILITIES THAT ARE SO DESPERATELY NEEDED.

AND IT THINK IT WOULD BE PREJUDICIAL AND IT IS NOW TOO LATE AND IT IS UNEXPLAINED AND UNJUSTIFIED FOR IRVINE TO COME INTO THIS COURT AT THIS LATE DATE AND TRY TO BE IN A POSITION WHERE IT CAN ATTACK THE FULL BREADTH OF THOSE ACTIVITIES.

SO I THINK, YOUR HONOR, THAT IF PERMISSIBLE INTERVENTION IS TO BE GRANTED I WOULD REQUEST THAT THE COURT CONDITION PERMISSIVE INTERVENTION ON THE CEQA CLAIMS AS BEING LIMITED SOLELY TO CEQA ISSUES AS THEY MAY RELATE TO THE ADOPTION BY THE COUNTY OF RESOLUTION 851231, AND THE CITY OF IRVINE NOT BE PERMITTED TO RAISE ANY ADDITIONAL CEQA CLAIMS IN THIS CASE.

THE COURT: ALL RIGHT. THANK YOU. ANYONE ELSE WISH TO BE HEARD?

MS. LOVIC: MARY LOVIC, YOUR HONOR, FOR PACIFIC SOUTHWEST AIRLINES.

THE COURT: THANK YOU.

MS. LOVIC: I WOULD JUST BRIEFLY LIKE TO ADDRESS SOME OF THE POINTS THAT IRVINE MADE IN ITS REPLY TO PSA'S OPPOSITION WITH RESPECT TO THE STATUTE OF LIMITATIONS.

FIRST, I WOULD LIKE TO POINT OUT THAT IRVINE'S ONLY REAL COUNTERCLAIM INVOLVES ITS CONCERN OVER JOINT MILITARY AND CIVILIAN USE OF THE EL TORO AIR STATION.

THIS CLAIM IS THE ONLY ONE DISCUSSED AT ANY LENGTH IN IRVINE'S POINTS AND AUTHORITIES SUPPORTING ITS MOTION TO INTERVENE.

AND COUNSEL'S CHANGE OF POSITION SUDDENLY AFTER HIS INITIAL MEMORANDUM OF POINTS AND AUTHORITIES IS VERY INTERESTING TO ME.

I THINK IT HAS GOOD REASON FOR ONLY RAISING THIS – OR ONLY HAVING AN INTEREST AS TO THIS PARTICULAR CLAIM BECAUSE IT LACKS STANDING TO RAISE THE ISSUES IN ITS PROPOSED COUNTERCLAIM ARISING UNDER THE FEDERAL AVIATION STATUTES AND THE U.S. CONSTITUTION.

THE CITY OF NEWPORT BEACH HAS POINTED OUT IN ITS MOVING PAPERS THAT IRVINE HAS NO STANDING WITH RESPECT TO THESE ISSUES, AND IN ANY CASE ITS INTERESTS ARE ADEQUATELY REPRESENTED BY THE AIR CARRIER DEFENDANTS.

WITH RESPECT TO TOLLING THE STATUTE OF LIMITATIONS TO ALLOW ITS COUNTERCLAIM IN INTERVENTION TO RELATE BACK TO THE FILING OF ORANGE COUNTY'S COMPLAINT, I WOULD POINT OUT THAT IRVINE'S AUTHORITIES WHICH IT CITES IN ITS REPLY BRIEF DO NOT SUPPORT ITS POSITION THAT THE STATUTE OF LIMITATIONS SHOULD BE

TOLLED.

THE PASSAGE REGARDING TOLLING CITED FROM WRIGHT AND MILLER TREATISE APPLIED ONLY TO COUNTERCLAIMS FILED BY NAMED DEFENDANTS, NOT TO INTERVENOR DEFENDANTS.

IN FACT, THE PASSAGE FROM WRIGHT AND MILLER STATES THAT:

> "THE LAW IS UNSETTLED WITH RESPECT TO THE STATUTE OF LIMITATIONS GOVERNING COUNTERCLAIMS BY NAMED DEFENDANTS."

CERTAINLY THIS PASSAGE DID NOT APPLY WITH REGARD TO INTERVENING DEFENDANTS.

IN EXCHANGE NATIONAL BANK VERSUS ABRAMSON CITED BY IRVINE IN ITS REPLY PAPERS, THE COURT ADDRESSES THE ISSUE OF WHETHER DEFENDANT INTERVENORS MAY ASSERT ANY CROSS COUNTERCLAIMS AT ALL AGAINST THE PLAINTIFF.

IN EXCHANGE NATIONAL BANK THE MINNESOTA DISTRICT COURT ACKNOWLEDGES THAT THERE IS DISAGREEMENT AS TO WHETHER AN INTERVENOR MAY ASSERT EVEN TIMELY FILED COUNTERCLAIMS.

SO CERTAINLY, YOUR HONOR, THIS CASE IS NOT AUTHORITATIVE REGARDING TIME-BARRED COUNTERCLAIMS EXCEPT FOR THE PROPOSITION THAT THE LAW IS UNSETTLED.

THE AUTHORITY REGARDING THE STATUTE OF LIMITATIONS IN IRVINE'S REPLY BRIEF MAY NOT SUPPORT IRVINE'S POSITION, BUT IT DOES OFFER THIS COURT SOME ASSISTANCE IN DETERMINING WHETHER THE STATUTE OF LIMITATIONS SHOULD BE TOLLED IN THIS CASE.

BOTH THE COURT IN THE EXCHANGE NA-

TIONAL BANK CASE AND THE ARGUMENTS IN WRIGHT AND MILLER POINT OUT THAT FAIRNESS TO THE PLAINTIFF IS THE KEY IN DECIDING WHETHER A TIME-BARRING COUNTERCLAIMING ACTION SHOULD BE PERMITTED UNDER THE TOLLING DOCTRINE.

WHERE THE PLAINTIFF HAS NAMED A DEFENDANT IN A SUIT, THE PLAINTIFF HAS NOTICED OF THAT DEFENDANT'S POTENTIAL COUNTERCLAIM, A COUNTERCLAIM IN THIS SITUATION IS FAIR.

CERTAINLY WITH RESPECT TO THE NAMED DEFENDANTS IN THIS SUIT, ORANGE COUNTY HAD NOTICE OF THE COUNTERCLAIMS OF THE NAMED DEFENDANTS. IN FACT, ORANGE COUNTY FILED THIS DECLARATORY RELIEF SUIT FOR THE VERY PURPOSE OF BRINGING ALL THESE COUNTERCLAIMS INTO ONE FORUM, THUS TOLLING OF THE STATUTE OF LIMITATIONS WITH RESPECT TO THE COUNTERCLAIMS OF THE NAMED DEFENDANTS BY ORANGE COUNTIES WAS FAIR.

THE SITUATION JUST DESCRIBED, HOWEVER, SHARPLY CONTRASTS WITH THE ONE NOW BEFORE THIS COURT. ORANGE COUNTY DID NOT NAME IRVINE AS A DEFENDANT IN THIS SUIT, AND IRVINE ADMITS IN ITS MOVING PAPERS THAT IT DID NOT WISH TO JOIN AS A PLAINTIFF WHEN THE SUIT WAS FIRST FILED BECAUSE ITS INTERESTS WERE ADEQUATELY REPRESENTED BY OTHER PARTIES.

NOW THE SPON, THE AIRPORT WORKING GROUP, AND NEWPORT BEACH ON THE ONE HAND, AND ORANGE COUNTY ON THE OTHER HAVE REACHED A SETTLEMENT AS TO THEIR DISPUTE, IRVINE SUDDENLY WISHES TO BRING A TIME-BARRED COUNTERCLAIM ACTION.

INDEED, IRVINE'S COUNTERCLAIM IN INTERVENTION IS A COUNTERCLAIM ONLY DUE TO THE

PROCEDURAL POSTURE OF THE PARTIES IN THIS DECLARATORY RELIEF ACTION.

IN REALITY, IRVINE'S CLAIM IS MORE AKIN TO THE CLAIM OF THE PLAINTIFF INTERVENING AND IT SHOULD BE TREATED AS SUCH FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

FAIRNESS WILL NOT PERMIT THE STATUTE OF LIMITATIONS TO BE TOLLED ON IRVINE'S CLAIMS ARISING UNDER CEQA TO PERMIT IRVINE TO ASSERT ITS TIME-BARRED CLAIM WITH PREJUDICE TO ORANGE COUNTY AND THE OTHER SETTLING PARTIES.

THEREFORE, THE COURT SHOULD APPLY THE STATUTE OF LIMITATIONS TO PREVENT IRVINE FROM BRINGING ITS TIME-BARRED CLAIM PARTICULARLY WHERE INTERVENTION IS PERMISSIVE.

I WOULD ALSO POINT OUT THAT CUMMINGS VERSUS U.S. CITED BY IRVINE IS NOT RELEVANT TO THE INSTANT CASE.

IN CUMMINGS THE INTERVENTION WAS PERMITTED BECAUSE OF THE SPECIAL RELATIONSHIP BETWEEN AN INSURER AND ITS INSURED.

PRINCIPLES GOVERNING PARTIES IN INTEREST WERE ALMOST AS IMPORTANT AS PRINCIPLES GOVERNING INTERVENTION IN THAT DECISION.

THERE IS NO SUCH SPECIAL RELATIONSHIP BETWEEN IRVINE AND ANY NAMED DEFENDANT IN THE INSTANT CASE.

IRVINE IS STANDING IN ITS OWN SHOES IN THIS COURT AND IT SHOULD NOT BE TREATED AS A REAL PARTY IN INTEREST.

IN SUM, I WOULD STATE FOR THE COURT THAT IRVINE'S ONLY VIABLE CLAIM ARISES UN-

DER CEQA. THIS CLAIM IS TIME-BARRED, AND IT WOULD NOT BE FAIR TO THE PARTIES TO THIS SUIT WHO HAVE REACHED A SETTLEMENT AFTER SO MUCH WORK, TO TOLL A STATUTE OF LIMITATIONS SO THAT THIS CLAIM WILL RELATE BACK.

PSA WOULD ASK THIS COURT TO DENY IRVINE'S MOTION TO INTERVENE.

THE COURT: THANK YOU.

MS. LOVIK: THANK YOU.

THE COURT: ALL RIGHT. MR. MC DERMOTT, FIVE MINUTES. YOU DON'T HAVE TO USE ALL OF IT.

(LAUGHTER.)

MR. MC DERMOTT: I'LL TRY.

THE COURT: SEE THAT YOU DO.

(LAUGHTER.)

MR. MC DERMOTT: JUST A FEW COMMENTS. FIRST OF ALL, WITH REGARD TO THIS ISSUE THAT SOMEHOW OR OTHER THAT IRVINE'S ONLY INTEREST IS IN EL TORO.

THE FACT IS WHATEVER IS DONE WITH JOHN WAYNE AIRPORT, THE EXPANSION THAT IS INVOLVED IS GOING TO HAVE NOISE PROBLEMS, TRAFFIC CONGESTION PROBLEMS, THINGS OF THAT SORT IN THE WAY OF ENVIRONMENTAL EFFECTS THAT IRVINE HAS AN INTEREST IN IN TERMS OF WHAT ACTIONS THE COUNTY WILL TAKE TO MITIGATE THE AIR AND TRAFFIC ENVIRONMENTAL EFFECTS.

IRRESPECTIVE OF WHETHER IRVINE IS IN FAVOR OF UNLIMITED EXPANSION OR THE EXPANSION THAT HAS BEEN APPROVED, THEY CARE ABOUT THOSE ISSUES. THEY CARE ABOUT HOW THEY ARE RESOLVED BECAUSE THEY DO AFFECT IRVINE.

NOW THAT THE CITIZENS' GROUPS AND NEWPORT BEACH ARE NO LONGER INVOLVED, NOBODY IS THERE TO REPRESENT THOSE INTERESTS, AND IT IS A MISTAKE TO SAY THAT IRVINE'S ONLY INTEREST IS EL TORO.

THEY DO CARE ABOUT THOSE OTHER ISSUES. NO DOUBT THE EL TORO ISSUE IS WHAT MOTIVATED IRVINE'S INTERVENTION BECAUSE THEY NEVER THOUGHT THAT WAS ON THE TABLE.

BUT THAT DOESN'T MEAN THAT THEY DIDN'T HAVE AN INTEREST OR THAT THEY DON'T HAVE AN INTEREST IN THESE OTHER ISSUES. IT IS POSSIBLE TO TAKE BOTH POSITIONS UNLESS THINGS GET MISCHARACTERIZED OUT OF ALL PROPORTION.

SECONDLY, IT IS INCORRECT TO SAY THAT THE AIRLINES ARE SOMEHOW OR OTHER ADEQUATELY REPRESENTING THE CITY OF IRVINE'S INTERESTS ON THE ACCESS PLAN, THAT ONLY THE AIRLINES CAN DO THAT.

THAT'S JUST A COMPLETE MISREPRESENTATION OF THE EXISTING LAW. WE HAVE CITED THE CITY OF INGLEWOOD CASE WHERE EXACTLY THE SAME ARGUMENT WAS MADE WHERE THE NINTH CIRCUIT SAID THE FEDERAL AVIATION STATUTES DON'T JUST DEAL WITH QUESTIONS OF AIRLINER ACCESS. THEY ALSO INVOLVE COMMUNITIES, AND WE CARE ABOUT COMMUNITIES' CONCERNS. THEY WERE ENACTED FOR COMMUNITIES AS WELL AS FOR AIRLINES.

AND IT'S FROM IRVINE'S STANDPOINT, IT IS NOT THE ISSUE OF HOW MANY AIRLINES HAVE WHAT KIND OF ACCESS BUT IT IS THE IMPACT ON IRVINE IN THE WAY OF TRAFFIC NOISE, CONGESTION, AND OTHER SORTS OF THINGS THAT MAKE OUR INTERESTS DIFFERENT FROM THE AIR-

LINES, AND THAT THEY CANNOT ADEQUATELY REPRESENT, AND THAT WE ARE ENTITLED UNDER THE CITY OF INGLEWOOD DECISION TO BRING INTO THIS COURT OURSELVES.

FINALLY, IN TERMS OF PREJUDICE, THE CASES QUITE CLEARLY, ALMOST ALL OF THE CASES WHERE INTERVENTION GOES UP ON APPEAL, DEAL WITH A SITUATION WHERE SETTLING PARTIES ELIMINATE AN ISSUE FROM A LITIGATION; AND THEY ALWAYS MAKE THE ARGUMENT THAT THERE WOULD BE PREJUDICE BY THE FACT THAT THAT ISSUE WOULD BE REMOVED IF YOU ALLOW SOME INTERVENOR TO COME IN.

THAT IS ALWAYS THE WAY THE ISSUE OF PREJUDICE OR INTERVENTION ENDS UP BEING CHALLENGED AND TAKEN UP ON APPEAL.

THIS IS NOT DISPOSITIVE. YOU LOOK AT SOME OTHER EXTERNAL FACTOR, SOMETHING THAT IS GOING TO HAPPEN THAT BUT FOR THE INTERVENTION WILL BECOME IRREVOCABLE, AS WAS THE CASE IN THE NAACP CASE WHERE AN ELECTION WAS GOING TO TAKE PLACE.

NO SUCH THING HAS BEEN PRESENTED. NONE OF THE COUNSEL HERE TODAY HAVE SUGGESTED ANYTHING OTHER THAN THE ISSUE WOULD BE SETTLED IN WE DON'T ALLOW THE INTERVENTION.

THAT'S NOT ENOUGH. THERE HAS TO BE SOMETHING MORE THAN THAT. AND IT DOES AFFECT IRVINE. IT WILL AFFECT IRVINE, THE FACT THAT THEY TIED EL TORO TO THIS SITUATION; AND IRVINE DIDN'T DO THAT. THE SETTLING PARTIES DID THAT.

IT ALTERS ALL THE WAY IN WHICH YOU LOOK AT THAT ENVIRONMENTAL DOCUMENTATION BECAUSE IF YOU DON'T TAKE THAT

FACTOR INTO ACCOUNT HOW ARE YOU GOING TO KNOW WHETHER OR NOT ADEQUATE CONSIDERATION WAS GIVEN.

OUR WHOLE POINT IS THE ENVIRONMENTAL DOCUMENTATION ON WHICH THE COUNTY TOOK ITS ACTIONS IS INSUFFICIENT AND INADEQUATE TO JUSTIFY THE DECISION THE COUNTY MADE TO TIE EL TORO IN.

AND YOU HAVE TO GO BACK AND LOOK AT THAT ENVIRONMENTAL DOCUMENTATION IN LIGHT OF THAT DECISION THAT THEY HAVE MADE WHICH WAS NOT THE DECISION THAT WAS PROPOSED BACK IN FEBRUARY.

THEY HAVE CHANGED THE GAME. NOT US. THEY CHANGED IT. THEY DIDN'T TELL US WHAT THEY WERE GOING TO DO. THEY DIDN'T PULL US INTO THE SETTLEMENT NEGOTIATIONS. THEY DIDN'T ASK US WHAT WE THOUGHT.

THEY SIMPLY ADOPTED A RESOLUTION, CHANGED THE NATURE OF THE PROJECT, MADE A DECISION THAT IS UTTERLY INCONSISTENT WITH THE ENVIRONMENTAL DOCUMENTATION.

AND NOW THEY SAY TO US, AFTER THEY KEPT US OUT OF THE PROCESS AND KEPT US IN THE DARK:

> "YOU ARE NOT ALLOWED IN. YOU ARE TRYING TO BREAK UP A HISTORIC AGREEMENT AT THE LAST MINUTE."

OUR INTERESTS HAVE BEEN AFFECTED IN A WAY THAT WE NEVER CONTEMPLATED, AND I THINK WE OUGHT TO BE ENTITLED TO INTERVENE AND MAKE THOSE CLAIMS KNOWN TO THE COURT.

THE COURT: ALL RIGHT. FINE. THANK YOU. YOU STAYED WITHIN THE FIVE MINUTES. I APPRECIATE THAT AS WELL.

IT'S CLEAR TO ME, AS I HAVE ALREADY INDICATED, THAT INTERVENTION AS MATTER OF RIGHT IS NOT APPROPRIATE.

WE MOVE THEN TO 24(B), AND AGAIN I DON'T FIND THAT THE VARIOUS PRONGS OF THE TEST THAT HAVE BEEN ESTABLISHED BY THE NINTH CIRCUIT HAVE BEEN MET HERE, AND PARTICULARLY WITH REGARD TO TIMELINESS.

IF I WERE TO GRANT INTERVENTION, IT WOULD BE CONDITIONED TO SUCH A DEGREE THAT I AM NOT AT ALL SURE THAT THE CITY OF IRVINE WOULD FIND THAT IT WOULD BE SATISFIED WITH ITS DAY IN COURT.

FOR EXAMPLE, I WOULD PREVENT CEQA FROM BEING CHALLENGED. I WOULD NOT ALLOW THE ACCESS PLAN TO BE CHALLENGED AT THIS DATE.

BUT TO MOVE BACK TO THE BASIS, REALLY IS ONE OF PREJUDICE, AND IT IS QUITE CLEAR THAT THE CASES THAT DO GO UP ON APPEAL WHERE SETTLEMENT IS A PART OF THE UNDERLYING CASE BELOW VERY EASILY CAN TALK ABOUT THAT SETTLEMENT UNRAVELING AND THAT'S WHY I THINK THERE ARE SO MANY CASES OF THAT NATURE ON APPEAL.

THERE'S LITTLE DOUBT IN MY MIND THAT THE POSSIBILITY OF THIS SETTLEMENT UNRAVELING IS SO PREJUDICIAL THAT TO ALLOW THE CITY OF IRVINE TO INTERVENE AT THIS LATE DATE WOULD BE TANTAMOUNT TO DISASTER HERE, AND I AM NOT GOING TO ALLOW THAT; AND PARTICULARLY SINCE THE CITY CAN GO INTO A STATE FORUM OR PERHAPS FILE IN THE FEDERAL COURT, AND IF THEY FILE IN THE FEDERAL COURT I AM NOT SURE THAT UNDER OUR LOW NUMBER RULE THAT I WOULD ACCEPT THAT CASE.

HOWEVER, I HAVE TO WAIT AND SEE IF THAT IS THE CITY'S PLEASURE.

I AM GOING TO DENY THE MOTION. AND WHO WOULD LIKE TO PREPARE THE ORDER?

MR. GATZKE: WE WILL, YOUR HONOR.

THE COURT: FINE. THANK YOU.

MR. SPAN: YOUR HONOR?

THE COURT: YES?

MR. SPAN: THERE IS ONE MORE ITEM, YOUR HONOR.

ROBERT SPAN FOR UNITED AIRLINES.

THE COURT: YES.

MR. SPAN: WE WERE HERE THREE WEEKS AGO AND THERE WAS SOME DISCUSSION OF A STATUS CONFERENCE TODAY.

MY UNDERSTANDING IS IT WOULD PROBABLY NOT BE APPROPRIATE TODAY BECAUSE ONE OF THE ITEMS UPON WHICH THAT STATUS CONFERENCE DEPENDED WAS SOME CIRCULATION OF PAPERS REGARDING THE SETTLEMENT FROM THE COUNTY OF ORANGE.

THE COURT: THAT'S RIGHT.

MR. SPAN: I WONDERED IF WE MIGHT JUST INQUIRE OF THE COUNTY AS TO WHAT THE STATUS OF THAT IS AND WHEN WE MIGHT BE ABLE TO GET ON FOR A STATUS CONFERENCE.

THE COURT: ALL RIGHT. MR. GATZKE?

MR. GATZKE: YOUR HONOR, I SPOKE WITH THE OFFICE OF THE CHIEF COUNSEL OF FAA LATE LAST WEEK AND WAS TOLD THAT THE DOCUMENTS WE HAVE BEEN AWAITING IS NOW AWAITING SIGNATURE BY THE ADMINISTRATOR OF FAA WHO

WAS IN CALIFORNIA LAST WEEK AND WAS EXPECTED TO BE BACK IN HIS OFFICE TODAY.

THE COURT: TAKING A FLIGHT OUT OF JOHN WAYNE?

MR. GATZKE: YES. WE WERE AWARE HE WAS GOING TO BE IN ORANGE COUNTY. WE WERE ALL HOLDING OUR BREATH.

I AM TOLD THAT WE WILL BE RECEIVING THAT DOCUMENT MIDWEEK THIS WEEK, AND IF THAT IS TRUE, THEN WE WILL BE FILING OUR PAPERS SHORTLY THEREAFTER.

THE COURT: ALL RIGHT. FINE. THANK YOU VERY MUCH. THANK YOU, ALL COUNSEL.

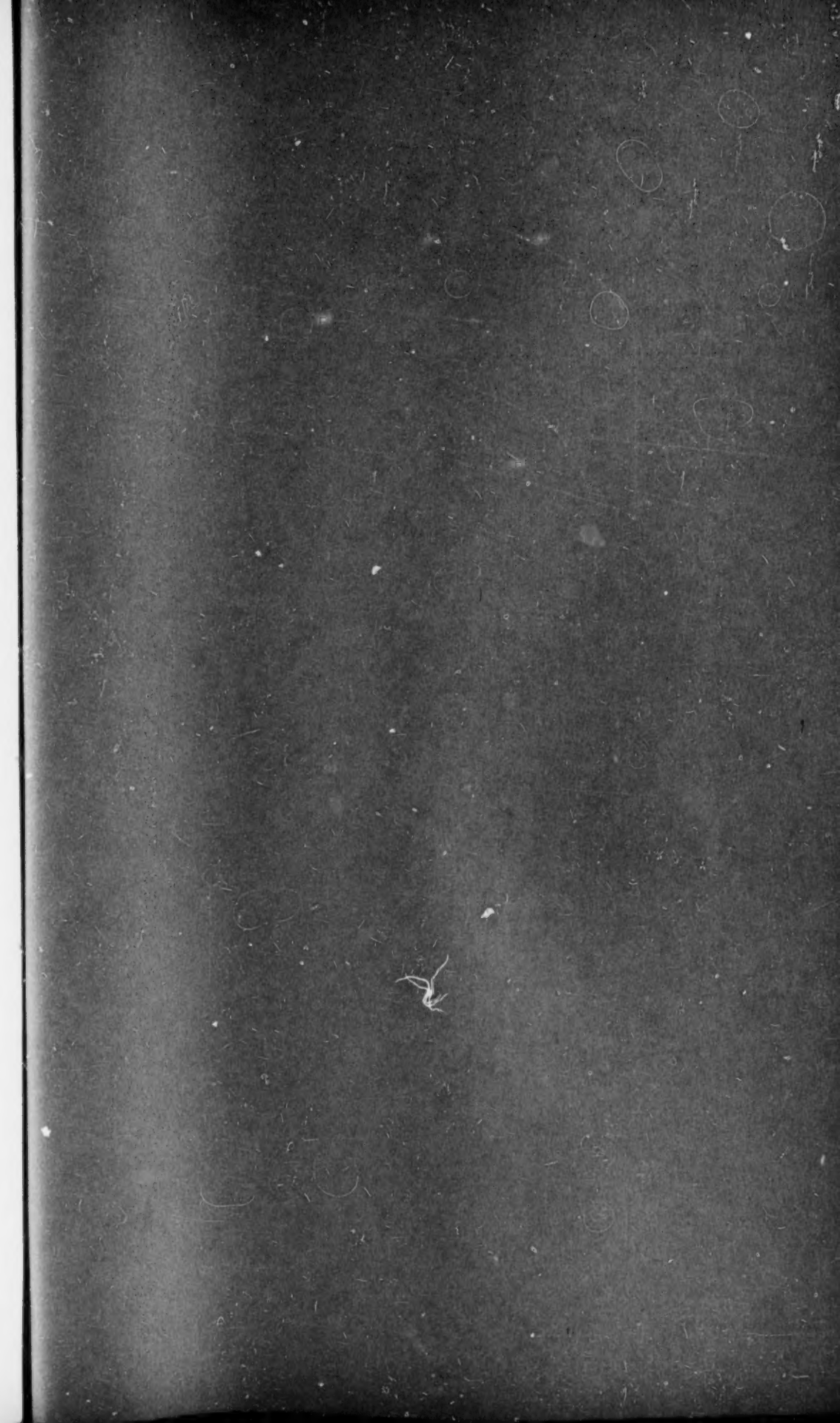
(PROCEEDINGS CONCLUDED.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ _____ 11/13/85

CERTIFIED SHORTHAND REPORTER DATE



Supreme Court, U.S.
FILED
MAR 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF IRVINE,
Petitioner,

vs.

COUNTY OF ORANGE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF AND SECOND SUPPLEMENTAL APPENDIX

McDERMOTT, WILL & EMERY
JOHN E. McDERMOTT*
ERICH R. LUSCHEI
Suite 600
2049 Century Park East
Los Angeles, CA 90067
(213) 277-4110
Attorneys for Petitioner

*(Counsel of Record)

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

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No. 86-1305

IN THE

Supreme Court of the United States

October Term 1986

THE CITY OF IRVINE,
Petitioner,

vs.

COUNTY OF ORANGE, et al.,
Respondents.

PETITIONER'S REPLY BRIEF AND SECOND SUPPLEMENTAL APPENDIX

I. RESPONDENTS' RELIANCE ON *NAACP V. NEW YORK* IS MISPLACED

On the timeliness of Irvine's motion to intervene, respondents contend that the lower court rulings in this case fall squarely within the parameters of *NAACP v. New York*, 413 U.S. 345 (1973). Nothing could be further from the truth. This case presents distinct facts from *NAACP* which have not been addressed definitively by this or any other court and warrant review by this Court to clarify the construction and application of Fed. R. Civ. P., Rule 24.

When this litigation began, it was *only* about the expansion of John Wayne Airport. El Toro MCAS was not in any way the subject of the lawsuit, nor was the County's resolution opposing commercial use of El Toro MCAS.

Irvine, relying on that resolution, felt comfortable that its sister city Newport Beach would adequately protect its interests in the John Wayne Airport litigation.

Under respondents' reading of *NAACP*, Irvine should have known that this litigation might be settled and should have taken affirmative steps to protect its interests. But settled in what manner? Irvine may have had reason to expect that litigation affecting the expansion of John Wayne Airport, which is all that the County's suit was about, could be settled. Yet it never imagined, nor had any reason to suppose, that the litigation might be settled *on the condition* that the County of Orange repeal a resolution opposing commercial development of El Toro MCAS, an entirely separate airport which never was the subject of the County's suit. Expecting Irvine to anticipate such an outcome is not only unreasonable but would turn *NAACP* on its ear and produce a harsh and unfair result never intended by this Court in *NAACP*.

Denial of Irvine's motion to intervene for lack of timeliness also punishes the wrong party. It rewards the County for its failure, either in its complaint or *prior* to the Settlement Agreement, to notify the one party most affected by the repeal of its resolution opposing commercial use of El Toro — The City of Irvine, in whose sphere of interest El Toro is located. It punishes Irvine for its reliance on the County's complaint and the County's resolution opposing commercial use of El Toro MCAS.

NAACP is simply not applicable because the terms of the consent decree there did not exceed the issues raised by the complaint. The only equitable solution to the application of the timeliness standard to motions to intervene is that the complaint should govern the scope of the issues Irvine should have known might be settled. As to any other issues,

timeliness should be judged according to "when the intervenor became aware that its interest would no longer be protected by the parties." *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980) (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)).

In this case, the complaint makes no mention of El Toro MCAS; it concerns itself *solely* with the proposed expansion of John Wayne Airport. *See* Petitioner's Reply Brief, Second Supplemental Appendix. The record is clear that, notwithstanding publicity about the possibility of settlement, Irvine did not learn of *the repeal of the County's resolution opposing commercial use of El Toro* until the settlement was announced, at which point it acted expeditiously to intervene. The Court should accept this case for hearing because of the lack of clarity about the scope of *NAACP*, the need to harmonize its decisions in *NAACP* and *McDonald* and to resolve an important dispute over the correct construction and interpretation of Fed. R. Civ. P., Rule 24.[1]

---

[1] For these same reasons, respondents' request for sanctions pursuant to 28 U.S.C. § 1927 and Supreme Court Rules 49.2 and 50.7 is wholly inappropriate. Those provisions only apply to frivolous appeals. Respondents' characterization of Irvine's inferences regarding the County's intentions toward El Toro MCAS is intemperate (Respondent's Brief at 7 n.3), has nothing to do with the issue of timeliness which is the subject of this petition and thus is not a basis for an award of sanctions. Irvine made no "misrepresentations," only its own inferences and opinions which counsel made clear to the Court were inferences in a letter following the petition. Respondents' Brief, Supplemental Appendix at 26a. Irvine continues to believe those inferences are fair to make in view of the County's failure even to notify or consult with Irvine before rescindng its resolution opposing commercial use of El Toro.

NAACP is distinguishable in another respect. Had intervention been permitted in *NAACP*, a city election would have been affected. 413 U.S. at 368-69. No such palpable prejudice is present here. Irvine merely wishes to be placed in the same position it would have been in had the County been straightforward from the outset about its intention regarding El Toro, or advised Irvine *before the Settlement Agreement* that it was considering the repeal of its resolution opposing commercial use of El Toro.

Dated: March 12, 1987

Respectfully Submitted,

McDERMOTT, WILL & EMERY

JOHN E. McDERMOTT
(Counsel of Record)
ERICH R. LUSCHEI

APPENDIX A

Gatzke, Lodge & Mispagel
Michael Scott Gatzke*
Mark J. Dillon
2890 Pio Pico Drive, Ste. E
P.O. Box 1636
Carlsbad, CA 92088
(619)-729-2304

*A Professional Corporation

Adrian Kuyper, County Counsel
Daniel J. Didier, Deputy County Counsel
Office of the County Counsel
10 Civic Center Plaza
P. O. Box 1379
Santa Ana, California 92702
(714) 834-3300

Attorneys for Plaintiff, the County of Orange

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-1542 TJH (MCx)
FIRST AMENDED COMPLAINT

FILED
March 15, 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

COUNTY OF ORANGE,
Plaintiff,

v.

AIR CALIFORNIA, AMERICAN AIRLINES, AMERICA WEST AIRLINES, CONTINENTAL AIR LINES, INC., FRONTIER AIRLINES, INC., JET AMERICA, PACIFIC SOUTHWEST AIRLINES, REPUBLIC AIRLINES, INC., WESTERN AIR LINES, INC., ALASKA AIRLINES, INC., MUSE AIR CORPORATION, TRANS WORLD AIRLINES, INC., UNITED AIRLINES, INC., FEDERAL AVIATION ADMINISTRATION, McDONNELL DOUGLAS CORPORATION, CITY OF NEWPORT BEACH, STOP POLLUTING OUR NEWPORT CORPORATION, AIRPORT WORKING GROUP OF ORANGE COUNTY, INC., DOES 1 THROUGH 1,000, INCLUSIVE,
Defendants

Amending its Complaint as a matter of right, Plaintiff, the County of Orange, a political subdivision of the State of California, for its First Amended Complaint ("Complaint"), alleges:

NATURE OF THE CASE, JURISDICTION AND VENUE

1. This is an action for declaratory relief in respect of controversies arising under the United States Constitution (the Supremacy Clause, Art. VI, cl. 2; and the Commerce Clause, Art. I, §8, cl. 3); the Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301 *et seq.* (including amendments made by the Airline Deregulation Act of 1978); the Airport and Airway Development Act of 1970, former 49

U.S.C. §1701 *et seq.*; the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. §2101 *et seq.*; the Airport and Airway Improvement Act of 1982, 49 U.S.C. §2201 *et seq.*; the National Environmental Policy Act of 1969 ("NEPA"), as amended, 28 U.S.C. §4321 *et seq.*; and regulations and orders of the Federal Aviation administration in implementation and enforcement of those acts.

Plaintiff is the proprietor of John Wayne Airport, Orange County ("JWA"), a commercial air carrier airport located in Orange county. As alleged below, plaintiff has recently taken a series of discretionary legislative actions in respect of use and regulation of John Wayne Airport. These actions have created substantial interrelated controversies between and among the parties. A prompt judicial resolution of all of these controversies is necessary to allow the plaintiff to discharge promptly and efficiently its public responsibilities as the proprietor of JWA. These inevitably interrelated controversies are complex, and this action is brought to afford all interested and affected parties an opportunity to litigate their respective and related claims in a single forum.

2. Jurisdiction of this Court is proper by virtue of 28 U.S.C. §1331, because this is a civil action arising under the Constitution and the laws of the United States; and under 28 U.S.C. §1337 because this action arises under Acts of Congress regulating commerce.

3. Plaintiff additionally invokes the pendent (and ancillary) jurisdiction of this Court in respect of related state law claims under the California Environmental Quality Act (Public Resources Code §21000 *et seq.* ["CEQA"]), and the implementing regulations, the State CEQA Guidelines (14 Cal.Admin.Code §15000 *et seq.* ["the Guidelines"]). These State law claims are inevitably related to, and affected by the federal issues rasied in this

complaint. The exercise of pendent jurisdiction by this Court is necessary to afford complete relief among the parties and to avoid a multiplicity of actions which would otherwise threaten plaintiff with potentially inconsistent adjudications of related issues, and the possible imposition of inconsistent obligations on plaintiff.

4. Venue is proper in this District by virtue of 28 U.S.C. §1391(b), in that the cause of action arose in this District.

5. The relief sought in this action is a declaratory judgment under 28 U.S.C. §§2201 and 2202, declaring the rights, obligations and legal relations of the parties which are in controversy; and such preliminary and permanent injunctive relief and orders as may be necessary to permit a meaningful and complete adjudication of the issues, and the enforcement of the decisions of this Court.

THE PARTIES

The Plaintiff.

6. Plaintiff, the County of Orange ("the County"), is a political subdivision of the State of California. Under the authority of California law, the County is the proprietor and landlord of John Wayne Airport, Orange County ("JWA").

The Airline Defendants.

The "Authorized Air Carriers"

7. The County is informed and believes, and on that ground alleges that defendant Air California ("AirCal") is a

corporation, and a federally certificated air carrier authorized to do business in the State of California.

8. The County is informed and believes, and on that ground alleges that defendant American Airlines, Inc. ("American") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

9. The County is informed and believes, and on that ground alleges that defendant America West Airlines, ("America West") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

10. The County is informed and believes, and on that ground alleges that defendant Continental Air Lines, Inc. ("Continental") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

11. The County is informed and believes, and on that ground alleges that defendant Frontier Airlines, Inc. ("Frontier") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

12. The County is informed and believes, and on that ground alleges that defendant Jet America ("Jet America") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

13. The County is informed and believes, and on that ground alleges that defendant Pacific Southwest Airlines ("PSA") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

14. The County is informed and believes, and on that ground alleges that defendant Republic Airlines, Inc. ("Republic") is a corporation, and a federally certificated

air carrier authorized to do business in the State of California.

15. The County is informed and believes, and on that ground alleges that defendant Western Air Lines, Inc. ("Western") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

16. AirCal, American, Frontier, PSA, Republic and Western are currently regulated commercial operators authorized by the County to do business at JWA. By action on February 26, 1985, the County Board of Supervisors authorized its staff to negotiate operating agreements, leases, or any other necessary documents with America West, Continental and Jet America for regulated commercial service at JWA. None of these defendants have consented to be named in this action. In the remainder of this complaint, these nine defendants are occasionally referred to collectively as "the Authorized Air Carriers." America West, Continental and Jet America are occasionally referred to collectively as "the New Entrant Air Carriers."

The "Waiting List Air Carriers"

17. The County is informed and believes, and on that ground alleges that defendant Alaska Airlines, Inc. ("Alaska") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

18. The County is informed and believes, and on that ground alleges that defendant Muse Air Corporation ("Muse") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

19. The County is informed and believes, and on that ground alleges that defendant Trans World Airlines, Inc. ("TWA") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

20. The County is informed and believes, and on that ground alleges that defendant United Airlines, Inc. ("United") is a corporation, and a federally certificated air carrier authorized to do business in the State of California.

21. Alaska, Muse, TWA and United are potential regulated commercial operators which have requested permission to commence operations at JWA. Pursuant to County policy and regulation, these carriers have been placed on a waiting list from which new air carriers may be selected to commence operations at JWA under certain circumstances and conditions. They are not currently authorized to engage in scheduled operations at JWA. In the remainder of this complaint, these four defendants are occasionally referred to collectively as "the Waiting List Air Carriers."

Other Defendants.

22. The Federal Aviation Administration ("FAA") is an agency of the United States Department of Transportation ("DOT"). Pursuant to direct statutory authority and regulatory delegation by DOT, FAA has extensive regulatory authority over various civil aviation matters in the United States by virtue of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301 *et seq.* ("the 1958 Act"), and Title 14 of the Code of Federal Regulations. FAA has not consented to be named as a party to this action.

23. The County is informed and believes, and on that ground alleges that defendant McDonnell Douglas Corporation ("MDC") is a corporation which, among other things, engages in the manufacture and sale of commercial aircraft, including the McDonnell Douglas MD-80 and related versions of the MD-80 aircraft.

24. The City of Newport Beach ("Newport Beach" or "the City") is a municipal corporation under the laws of the State of California, and is located within the County of Orange, California in an area generally to the south of JWA.

25. Stop Polluting Our Newport Corporation ("SPON") is a California corporation. The Plaintiff is informed and believes, and on that ground alleges that SPON purports to represent persons residing in Newport Beach in expressing their views concerning various local environmental matters, including environmental issues relating to JWA.

26. The County is informed and believes, and on that ground alleges that Airport Working Group of Orange County, Inc. ("AWG") is a California corporation; that AWG is a coalition of various organizations generally opposed to any increase in operations at JWA or other expansion of the airport; and that these groups and organizations represent various residents in Newport Beach and other areas to the south of JWA through AWG in their opposition to JWA operations.

27. Doe Defendants 1 through 1000, inclusive, are persons interested in the subject matter of this action, in whole or in part, and who take positions in respect of one or more of the controversies alleged in this complaint contrary and adverse to the positions of the plaintiff. Plaintiff is presently unaware of the actual identities of such persons, and therefore names them in this action by their respective fictitious names.

Background

John Wayne Airport

28. John Wayne Airport, Orange County is an airport serving commercial air carriers offering regularly scheduled passenger service to and from other airports in the United States. JWA is an element of the National Air Transportation System, and has been certificated by FAA under the provisions of 14 C.F.R. Part 139. JWA is also certificated as a commercial airport by the State of California.

29. JWA is the only commercial air carrier airport in Orange County. Because of substantial existing facility limitations and constraints, and because of regulations adopted by the County for environmental and other purposes, JWA presently serves only a portion of the existing demand for air transportation services in Orange County. That portion of the demand not served in Orange County must be served by other commercial air carrier airports in Southern California.

30. The County has received grants of federal funds for the development and improvement of airport facilities at JWA under the Airport and Airway Development Act of 1970 ("the 1970 Act"). In accepting such funds, the County entered into written contracts with the FAA (acting on behalf of the United States), as provided and required by the 1970 Act.

31. Since at least 1972, the County has regulated the scope and nature of certain uses of JWA by the public and by commercial air carriers. This regulation has been undertaken in the sound exercise of the County's legislative discretion to control noise and other environmental effects

of aircraft operations at JWA, and for other purposes. In engaging in such regulation, the County has been exercising its federally authorized proprietor rights to regulate JWA for the purpose of controlling its potential litigation exposure to persons who might claim that the operation of JWA has taken or damaged their property, or caused them bodily injury. The County is currently a defendant in such damage actions now pending in the Orange County Superior Court and has been a defendant in other similar actions in the past.

In adopting such regulations, the County has also been acting within its authority as the proprietor of JWA to regulate airport use in a manner which strikes an appropriate balance between local needs for air transportation services and the potential environmental consequences of air transportation activities at JWA.

32. Among other regulations, since 1972, the County has limited the permissible number of average daily departures ("ADDs") by regularly scheduled commercial operators operating relatively noisier types of aircraft. Although the form of this regulation has been expressed in various terms since 1972, the substance of the regulation remained essentially the same between 1972 and 1982. Since 1972 the maximum permitted level of ADDs at JWA has been 41 ADD.

33. On March 17, 1982, the County adopted its commercial airline access plan for JWA ("the March, 1982 Plan.") The March, 1982 plan regulated ADDs essentially as follows:

(a) "Class B" ADDs were defined by noise and weight limitations. The types of commercial jet aircraft which had historically used JWA, such as the B737-200 and DC-9-10/30, were Class B aircraft;

(b) "Class A" ADDs were aircraft defined by noise and weight limitations. The permissible levels of noise for "Class A" aircraft were lower than for "Class B" aircraft. The MD-80 is one aircraft which qualified as "Class A" aircraft; and

(c) ADDs were to be reallocated during the two year period of the plan (June 1, 1982 to May 31, 1984) on a quarterly basis to afford additional operational opportunities for various air carriers, with preference in reallocation given to Class A ADDs.

34. On July 18, 1983, the Airport Manager of JWA presented to the Board of Supervisors the report and results of a study authorized by the Board regarding the capacity and limitations on the use of existing facilities at JWA by commercial air carriers. (*John Wayne Airport Facilities Capacity Study* ["the Facilities Capacity Study"]). This study was prepared by an independent consultant, and concluded that the existing facilities at JWA were not reasonably capable of accommodating more than five commercial air carriers. Six commercial carriers were then serving JWA.

35. Because of the matters disclosed and confirmed by the Facilities Capacity Study, the Board of Supervisors, by their Resolution No. 83-1556 (October 19, 1983), limited the permitted number of commercial carriers at JWA to six. This action was confirmed and extended on May 30, 1984 by Board Resolution No. 84-846. In Resolution No. 83-1556, and as confirmed by subsequent action of the Board of Supervisors, the Airport Manager of JWA was directed to maintain a "waiting list" of persons desiring to commence regularly scheduled commercial air carrier service at JWA, with the anticipation that if new entry opportunities became available at JWA for such operators,

they would be selected from (and in the order of) the waiting list during the period of the Interim Plan alleged in the following paragraph.

36. On May 30, 1984, the County, by Board Resolution No. 84-846, also adopted an interim access plan and regulation ("the Interim Plan") which, by subsequent actions, has been extended to March 31, 1985. The Interim Plan precludes operations at JWA by regularly scheduled commercial air carriers using aircraft noisier than the County's definition of Class A aircraft.

37. Historically, the County has regulated operations (ADDs) by regularly scheduled commercial operators using aircraft which generated more than 89.5 dB SENEL at any of the monitoring stations of the County's noise monitoring system located to the south of the airport, the direction of operation for the vast majority of aircraft departures at JWA. In Resolution No. 84-579, and by subsequent actions extending the limitation to March 31, 1985, the County temporarily lowered this regulatory threshold to 86.0 dB SENEL because of its desire to ensure continuing regulatory control over commercial air carrier operations while the County completed EIR 508 and the CEQA process on the proposed project alleged and described below.

The Airport Project

38. On February 26, 1985, the County took final action to approve and adopt a project for JWA which, among other things: (1) increased the permitted number of ADDs; (2) created two classes of regulated commercial aircraft ("Class A" and "Class AA") with certain regulatory preferences given to the quieter Class AA aircraft; (3)

authorized the entry of three additional regulated commercial air carriers into service at JWA, selected in order from the Airport Manager's waiting list; and (4) provided for facilities improvements at JWA (including a new passenger terminal) and various land use actions in connection with the project approval of an increase in the authorized number of ADDs at JWA. These actions are sometimes referred to in this complaint for convenience as "the Airport project." For purposes of this action (and for purposes of CEQA), the project approved by the Board of Supervisors is described more precisely and in greater detail in Board Resolution Nos. 85-255 to 85-260 (all adopted on February 26, 1985) and the documents referred to in those resolutions.

39. The adoption of the Airport project was the culmination of a 15 month effort by the County to address both the future of the use of JWA through the year 2005, and the critical and controversial issues relating to the regulation of the airport. These issues affect both federal and local interests. Because of the requirements of CEQA, this planning effort and evaluation occurred in the context of the CEQA environmental process. The evaluation of possible airport regulations and restrictions was an element of EIR 508, prepared for the Airport project, and was undertaken in the context of possible mitigation measures which the County might adopt in connection with the EIR 508 project.

40. The Airport project began in December, 1982. At that time, the County's Environmental Management Agency ("EMA") and the Airport Manager's Office prepared a report for the Orange County Board of Supervisors which described a coordinated approach for the

preparation of documentation to critically evaluate future operations and development at JWA.

41. On December 15, 1982, the Board of Supervisors considered and approved the coordinated approach developed by the EMA and the JWA staff. By Board Minute Order, the Board directed staff to begin a study concerning the land use and environmental impacts associated with possible increases in authorized levels of regulated operations, associated development of JWA, and possible actions which might be taken in surrounding residential areas to enhance their compatibility with airport activities. County staff was instructed to report back to the Board within 90 days with recommendations for the Board's selection of a proposed project for planning and for CEQA evaluation.

42. At its meeting on April 13, 1983, the Board passed Resolution No. 83-547 formally adopting a proposed project for JWA. This project was defined as a two-phased increase in Class A ADDs and a master plan for related airport facilities improvements, together with a land use compatibility plan ("LUCP"). The phasing of the ADD increases was defined as an immediate increase from 41 ADD to 55 Class ADD ("Phase I"), with a further increase to 73 Class A ADD upon completion of the associated airport facilities improvements ("Phase II"). The Board also directed that staff prepare (with the assistance of consultants later approved by the Board) a project EIR. This EIR became County EIR 508.

43. The County also coordinated with FAA in order to allow EIR 508 to also be circulated and considered by FAA as an Environmental Impact Statement ("EIS") prepared under the National Environmental Policy Act ("NEPA"). FAA is currently considering EIR/EIS 508 in connection

with various regulatory responsibilities which it has in respect of JWA and the Airport Project.

44. During the preparation of EIR/EIS 508, the County consulted with FAA to discuss issues relating to airport regulation and airline access at JWA. FAA and the County (together with various other parties) had been engaged in litigation in this Court on such issues in the past (*e.g. PSA et al., etc. v. County of Orange, et al.*, C.D. Cal Civ. No. 81-3248-TJH (Gx) and *American Airlines, Inc. v. County of Orange, et al.*, C.D. Cal. Civ. No. 83-294-TJH (JRx)). Both FAA and the County desired to avoid future litigation between them and to reach an understanding accommodating both legitimate federal and local interests. To that end, the County advised FAA of the environmental and planning processes it was undertaking, and sought input from FAA regarding its views on how the County might regulate JWA (if the airport project were adopted) in a manner consistent with any statutory or contractual obligations the County might have to FAA or to the United States. FAA, recognizing the serious existing facilities constraints at JWA, and the legitimate concerns of the community and of existing airport users, provided its opinions, which were reflected in EIR/EIS 508. The views of FAA were evaluated in EIR 508 and incorporated into possible regulatory actions by the County which were considered by the County as a possible mitigation measure which might be adopted in connection with the Airport project.

45. On July 13, 1984, "*Draft Environmental Impact Report 508 and Draft Environmental Impact Statement 508 for the John Wayne Airport Master Plan and the Santa Ana Heights Land Use Compatibility Program*" ("DEIR 508") was completed and submitted to the County and to

FAA. On that same date, the County's EMA prepared and filed a Notice of Completion of DEIR 508 and circulated DEIR 508 for public review and comment.

46. The public review and comment period for DEIR 508 began on July 13, 1984, and was scheduled to end on August 27, 1984. On August 14, 1984, the City of Newport Beach requested in writing that the public review and comment period for DEIR 508 be extended from August 27, 1984 until September 11, 1984. On August 22, 1984, the Board of Supervisors authorized the extension of time in which to provide comments to DEIR 508 requested by the City.

47. In considering a project increase to 55 Class A ADDs (Phase I), and in light of the need to adopt a new commercial airline access plan, DEIR 508 discussed at length various alternative access plans which might be adopted as mitigation measures for the proposed project. The subject of airline access and airport regulation at JWA, as considered in DEIR 508, received extensive written comments by the City, SPON, AWG, MCD and various of the Airline Defendants. The City, SPON and AWG, in particular, contended in their comments that the County could not legitimately define the proposed project as an increase in authorized ADDs because, among other reasons, the County might lack authority to regulate airport operations at JWA. These defendants therefore contended that the DEIR was inadequate and incomplete under CEQA and that the County was unable to legally approve an increase in regulated operations at JWA.

At the same time, these defendants contended that DEIR 508 failed to adequately evaluate additional airport regulations which might be adopted by the County in mitigation of the proposed project.

48. Following public review and comment, the County reveiwed the written comments to DEIR 508 and prepared written responses to those comments. The County also made significant revisions and additions to DEIR 508 in response to the public comments, including the identification of additional access plan alternatives which might be adopted as mitigation measures for the project. Revised Draft EIR/EIS 508 ("RDEIR 508"), which consisted of DEIR 508, as amended (Volumes 1 and 2) and the public comments and staff responses (Volume 3), was then recirculated for public review and comment from November 13, 1984 to December 27, 1984.

49. Following public review and comment on RDEIR 508, the County evaluated the comments received from interested persons on the revised draft EIR and prepared written responses to those comments (Final EIR 508, Volume 4).

50. Between November 20, 1984 and January 23, 1985, the Orange County Planning Commission and the Orange County Airport Commission held approximately nine public hearings, and accepted written and oral comments from the public on the RDEIR and the proposed project. After receiving this additional input, and having considered RDEIR 508 and the comments and responses to the RDEIR, both commissions made their recommendations to the Board of Supervisors that the EIR be certified as adequate and complete, and made their respective recommendations regarding the proposed project.

51. On January 30, 1985, the Orange County Board of Supervisors considered the proposed project and EIR 508. At that time, the Board tentatively approved and certified the EIR, subject to preparation of final findings and their adoption by the Board, and selected a project authorizing a

phased increase in regulated ADDs, mitigated by various regulatory and other measures. The Board also tentatively approved construction of various specified airport improvements in connection with the authorized increase in regulated flights. The Board then continued the matter to February 13, 1985 to further consider the land use elements of the project, and to allow preparation of proposed findings for their consideration and approval.

52. On February 13, 1985, the Board held a public meeting at which they decided to seek further input on the land use (LUCP) elements of the project from the Planning Commission, and continued their deliberation on the project to February 26, 1985.

53. On February 26, 1985, the Board took final action by various resolutions to approve and implement the Airport project. Specifically:

(a) Resolution No. 85-255 certified EIR 508 as adequate and complete under applicable provisions of CEQA;

(b) Resolution No. 85-256 approved a master plan for facilities improvements at JWA and authorized various other implementing actions by County staff;

(c) Resolution No. 85-257 approved a land use plan ("LUCP") for areas generally south of JWA designed to enhance their compatibility with JWA;

(d) Resolution No. 85-258 approved a land use element action in connection with the LUCP;

(e) Resolution No. 85-259 adopted a Commercial Airline Access Plan and Regulation for JWA for the period April 1, 1985 to March 31, 1990 ("the 1985 Access Plan"); and

(f) Resolution No. 85-260 made related findings overriding determinations of the Airport Land Use Commission as provided for by California law.

54. The 1985 Access Plan was adopted by the County to serve a number of important purposes. The Plan implemented the project decision approved by the Board of Supervisors in the certification of EIR 508, including an increase from 41 ADD to 55 ADD on April 1, 1985 and the authorization of three additional carriers to commence service at JWA on that date. It also represented the next step in the County's longstanding policy of attempting to provide a reasonable level of air transportation service to the Orange County community, while achieving even further gains, in addition to those already realized by past County policies, in reducing aircraft noise in areas surrounding JWA. The plan also was effectively a compromise with the FAA in recognition of federal interests and concerns regarding airport access, while simultaneously reflecting recognition of realistic and practical limitations on the use of JWA during Phase I of the Airport project, and the legitimate interests and concerns of the local community.

55. Pursuant to Public Resources Code §21152(a), a Notice of Determination was filed by the County with the County Clerk on March 5, 1985. The filing and posting of the Notice of Determination had the effect of starting a 30-day statute of limitations on court challenges to the approval of the project under CEQA (Public Resources Code §21167(c); Guidelines §15094(d)).

56. The County is informed and believes, and on that ground alleges that in adopting the 1985 Access Plan, it met the concerns and objectives of FAA in respect of airport access, and struck a reasonable balance between the multitude of competing interests.

57. During the CEQA process, and in public comments made shortly thereafter, various parties to this action

indicated or stated their intent to initiate various legal actions against the County in various courts in respect of actions which the County took in approving the Airport project. The County is informed and believes, and on that ground alleges, that:

(a) SPON and the AWG intend to initiate an action actions in the Orange County Superior Court challenging the Airport project decisions of the County on CEQA grounds, and in such action or actions, they do not intend to bring before the Court all of the parties and related issues raised by this Complaint;

(b) Newport Beach is considering initiating an action or actions in the Orange County Superior Court challenging the Airport project decisions of the County on CEQA grounds and that if such actions are initiated, the City would not intend to bring before the Court all of the parties and related issues raised by this Complaint;

(c) McDonnell Douglas intends to initiate action in this federal court challenging certain of the County's Airport project decisions on federal statutory and constitutional grounds, and that if such actions are initiated, MCD would not intend to bring before the Court all of the parties and related issues raised by this Complaint;

(d) The Waiting List Air Carriers intend to initiate an action or actions in this federal court challenging certain of the County's Airport project decisions on federal statutory and constitutional grounds, and that if such actions are initiated, the Waiting List Air Carriers would not intend to bring before the Court all of the parties and related issues raised by this Complaint; and

(e) That each of the parties to this action is interested in, and would to some degree be affected by the decision of a court on each and every issue and controversy alleged in

this Complaint, or any other issues which any of the parties might raise regarding the County's Airport project decisions by way of response to this Complaint.

FIRST CAUSE OF ACTION
(Declaratory Relief)

58. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 57 of this complaint.

59. An actual controversy has arisen between and among the parties to this action regarding their respective rights, and obligations, and a declaration of such rights, duties and obligations by this Court is necessary to resolve this controversy. Specifically, the County is informed and believes that MCD, American, and Republic contend that provisions of the 1985 Access Plan which give certain regulatory preferences at JWA to commercial aircraft quieter than the McDonnell Douglas MD-80 are illegal and unconstitutional in that:

(a) Such provisions are unjustly discriminatory in violation of obligations of the County under its grant agreements with FAA and related provisions of the Airport and Airway Development Act of 1970;

(b) Such provisions are preempted and in violation of the Supremacy Clause because they have been preempted by regulatory action of FAA under the Federal Aviation Act of 1958 in regulations adopted by FAA under 14 C.F.R. Parts 36 and 91; and

(c) Such provisions violate Section 105 (a)(1) of the Airline Deregulation Act of 1978 (amending the 1958 Act), 49 U.S.C. §1305 (a)(1).

60. The County contends that its actions in adopting the 1985 Access Plan are legal and constitutional. The County

further contends that the defendants named in paragraph 59 have no standing or right of action under federal law to challenge the County's actions. The County further contends that its actions as alleged are reasonable and legitimate exercises of authority by an airport proprietor and that, under all of the circumstances, they constitute a reasonable accommodation between legitimate federal and local interests. The County further contends that its actions significantly reduce its potential exposure to noise related damage suits which might otherwise arise out of the operation of JWA and the implementation of the Airport project.

61. The County is informed and believes, and on that ground alleges that FAA would contend that the position of the County alleged in paragraph 60, is correct.

62. The County is further informed and believes that Newport Beach, SPON, AWG, PSA, Air Cal, Western and America West also contend that the provisions of the 1985 Access Plan at issue in this cause of action are legitimate and lawful exercises of proprietor authority.

63. A declaration of the rights and obligations of the parties is necessary in order to allow a meaningful implementation of the 1985 Access plan and realization of the environmentally mitigating effects of the regulations at issue in this cause of action.

SECOND CAUSE OF ACTION
(Declaratory Relief)

64. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 57 of this complaint.

65. An actual controversy has arisen between and among the parties to this action regarding their respective

rights, duties and obligations, and a declaration of such rights, duties and obligations by this Court is necessary to resolve this controversy. Specifically, the County is informed and believes that the Waiting List Air Carrier defendants contend that the decision of the County in connection with its certification of EIR 508 and adoption of the Airport Project, and its adoption of the 1985 Access Plan provisions allowing entry into service at JWA project by three additional air carriers during Phase I of the Airport project selected by the order in which their names appeared on the Airport Manager's waiting list was unlawful and unconstitutional in that:

(a) Such provisions are unjustly discriminatory in violation of obligations of the County under its grant agreements with FAA and related provisions of the Airport and Airway Development Act of 1970;

(b) Such provisions are preempted and in violation of the Supremacy Clause because they have been preempted by provisions of Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C §1349(a)); and

(c) Such provisions violate Section 105(a)(1) of the Airline Deregulation Act of 1978 (amending the 1958 Act, 49 U.S.C. §1305(a)(1)

66. The County contends that its actions in adopting the 1985 Access Plan are legal and constitutional. The County further contends that the defendants named in paragraph 65 have no standing or right of action under federal law to challenge the County's actions. The County further contends that its actions as alleged are reasonable and legitimate exercises of authority by an airport proprietor and that, under all of the circumstances, they constitute a reasonable accommodation between legitimate federal and local interests. The County further contends that its actions

significantly reduce its potential exposure to noise related damage suits which might otherwise arise out of the operation of JWA and the implementation of the Airport project.

67. The County is informed and believes that FAA, America West, Continental and Jet America contend that the County's actions as alleged in this cause of action are lawful and constitutional and constitute a reasonable exercise of authority by an airport proprietor.

68. A declaration of the rights and obligations of the parties is necessary in order to allow a meaningful implementation of the 1985 Access Plan and realization of the environmentally mitigating effects of the regulations at issue in this cause of action.

THIRD CAUSE OF ACTION
(Declaratory Relief)

69. The plaintiff incorporates by this reference the allegations of paragraphs 1 through 57 of this complaint.

70. An actual controversy has arisen between and among the parties to this action regarding their respective rights, duties and obligations, and a declaration of such rights, duties and obligations by this Court is necessary to resolve this controversy. Specifically, the County is informed and believes that the Waiting List Air Carrier defendants contend that the allocation provisions of the 1985 Access Plan, and the term of the Plan are unlawful and unconstitutional in that:

(a) Such provisions are unjustly discriminatory in violation of obligations of the County under its grant agreements with FAA and related provisions of the Airport and Airway Development Act of 1970;

(b) Such provisions are preempted and in violation of the Supremacy Clause because they have been preempted by provisions of Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. §1349(a)); and

(c) Such provisions violate Section 105 (a)(1) of the Airline Deregulation Act of 1978 (amending the 1958 Act), 49 U.S.C. §1305 (a)(1).

71. The County contends that its actions in adopting the 1985 Access Plan are legal and constitutional. The County further contends that the defendants named in paragraph 70 have no standing or right of action under federal law to challenge the County's actions. The County further contends that its actions as alleged are reasonable and legitimate exercises of authority by an airport proprietor and that, under all of the circumstances, they constitute a reasonable accommodation between legitimate federal and local interests. The County further contends that its actions significantly reduce its potential exposure to noise related damage suits which might otherwise arise out of the operation of JWA and the implementation of the Airport project.

72. The County is informed and believes, and on that ground alleges that FAA and the Authorized Air Carrier defendants agree with the contentions of the County alleged in paragraph 71.

73. A declaration of the rights and obligations of the parties is necessary in order to allow a meaningful implementation of the 1985 Access Plan and realization of the environmentally mitigating effects of the regulations at issue in this cause of action.

FOURTH CAUSE OF ACTION
(Declaratory Relief - Compliance with CEQA)
(Federal Law Claims)

74. The plaintiff incorporates by this reference the allegations of paragraphs 1 through 73 of this complaint.

75. An actual controversy involving federal laws and regulations has arisen between and among the parties to this action regarding their respective rights, duties and obligations, and a declaration of such rights, duties and obligations by this Court is necessary to resolve this controversy. Specifically, the County is informed and believes that Newport Beach, SPON and AWG ("the CEQA defendants") contend that in certifying EIR 508 as adequate and complete under CEQA in connection with the approval and implementation of the Airport project, the County violated CEQA in that:

(a) The County failed to prepare EIR 508 in a manner required by FAA Order 5050.2B, and in a manner required by FAA advisory circulars and regulations prepared with respect to public input and participation in the preparation and development of the Airport project;

(b) The County in part defined "the project" for EIR 508 in terms of an increase in the authorized number of regulated ADDs at JWA. The CEQA defendants contend that such definition of the EIR project is impermissible under CEQA because the County is now preempted by federal law, or may be preempted by federal law during the projected life of the project from regulating the permissible number of ADDs, rendering the EIR's project description inaccurate and thereby tainting the entirety of the environmental analysis in EIR 508;

(c) That the County has a duty under CEQA to adopt all feasible mitigation measures for the Airport project which would reduce the environmental effects of the project, including any and all possible regulations and restrictions on the use of JWA by aircraft operators regardless of the effects on airport operations and service, and that CEQA, to that extent, acts affirmatively to limit the discretion of an airport proprietor in the regulation of airport use, specifically the use of JWA: and

(d) That the County failed to comply with Public Resources Code §21168.9 which, the CEQA defendants contend, would require the County to seek the approval of the state courts of its project, and of its airport restrictions adopted or continued in mitigation of the project, before implementation of the project, including the project increase in authorized ADDs.

76. The County is further informed and believes, and on that ground alleges that, in the absence of this action, the CEQA defendants intend to initiate an action or actions against the County in state court under the provisions of CEQA, and that they intend to seek preliminary and permanent relief which would enjoin the implementation of the Airport project, and which would control or otherwise regulate by state court order the permissible level and nature of airport operations at JWA. Any such relief would inevitably prejudice federal privileges and rights of the County and the other defendants in respect of the implementation of the Airport project.

77. The County contends that it has complied with all applicable provisions of CEQA in the preparation and certification of EIR 508 and approval of the Airport project; that it has complied with any applicable federal orders or regulations in the development and adoption of

the project; that it now has under federal law, and that there is no reasonable basis to anticipate a change in federal law, the authority to regulate and restrict the permissible number of authorized ADDs at JWA; that no state law, including CEQA, may operate to limit the regulatory discretion of an airport proprietor, and that any and all such provisions in CEQA are preempted and unconstitutional under the Supremacy Clause of the United States Constitution; and that no state court may issue its orders inequity under authority of CEQA or any other state law which would operate in such a manner as to restrict the discretion of an airport proprietor in the regulation of airport use.

78. The County is informed and believes that all defendants to this action, other than the CEQA defendants, contend that the position of the County, as alleged in paragraph 77, is correct.

79. A declaration of the respective rights and obligations of the parties is necessary in order to avoid prejudice to their respective positions and their federally authorized and delegated rights and privileges, the unnecessary and unconstitutional imposition of inappropriate constraints on the air travelling public, and prejudice to those citizens of Orange County which will benefit from implementation of the Airport project.

FIFTH CAUSE OF ACTION
(Declaratory Relief - CEQA)
(Federal and Pendant State Law Claims)

80. The plaintiff incorporates by this reference the allegations of paragraphs 1 through 79 of this complaint.

81. An actual controversy involving both federal law and laws of the State of California has arisen between and among the parties to this action regarding their respective rights, duties and obligations, and a declaration of such rights, duties and obligations by this Court is necessary to resolve this controversy. Specifically, the County is informed and believes that Newport Beach, SPON and AWG contend that in certifying EIR 508 as adequate and complete under CEQA in connection with the approval and implementation of the Airport project, the County violated CEQA in that:

(a) The County in part defined "the project" for EIR 508 in terms of an increase in the authorized number of regulated ADDs at JWA. The CEQA defendants contend that such definition of the EIR project is impermissible under CEQA because the County is now preempted by federal law, or may be preempted by federal law during the projected life of the project from regulating the permissible number of ADDs, rendering the EIR's project description inaccurate and thereby tainting the entirety of the environmental analysis in EIR 508;

(b) The County in part defined the project of EIR 508 in terms of an increase in the number of authorized ADDs. The CEQA defendants contend that such definition of the EIR project is impermissible under CEQA because there is a possibility that the County may, at some future date, authorize further increases in ADD levels at JWA, and that the project must therefore be described in terms of the full, unlimited and unregulated "capacity" of any facility improvements at JWA undertaken pursuant to and in connection with the Airport project;

(c) The failure of the County to properly define the project for purposes of EIR 508 renders the EIR

description and analysis of the environmental consequences of the project misleading, inaccurate and incomplete; and

(d) That even if the project description is adequate and accurate, the EIR fails to adequately disclose the environmental consequences of the project in respect of its significant adverse environmental impacts including, but not limited to, traffic, air quality, growth inducing impacts and noise.

82. The County is further informed and believes, and on that ground alleges that, in the absence of this action, the CEQA defendants intend to initiate an action or actions against the County in state court under the provisions of CEQA, and that they intend to seek preliminary and permanent relief which would enjoin the implementation of the Airport project and control or otherwise regulate by state court order the permissible level and nature of airport operations at JWA. Any such relief would inevitably prejudice federal privileges and rights of the County and the other defendants in respect of the implementation of the Airport project.

83. The County contends that it has complied with all applicable provisions of CEQA in the preparation and certification of EIR 508 and approval of the Airport project; that it has not abused its discretion in adopting the project and certifying EIR 508 as adequate and complete; that it has proceeded in the manner required by law; and that its decisions in respect of the Airport project and EIR 508 are supported by substantial evidence.

84. The County has alleged that to the extent CEQA would purport to affect or limit in any way the discretion of the County as an airport proprietor in the regulation of airport use at JWA, it is preempted and unconstitutional under the Supremacy Clause of the United States

Constitution. The County does not contend that CEQA is preempted to the extent that it merely requires that a decision making body prepare and consider a report describing the environmental consequences of proposed discretionary actions or projects ("the informational purposes of CEQA"). The County contends that Final EIR 508 complies with the informational purposes and requirements of CEQA.

85. The County is informed and believes that all defendants to this action, other than the CEQA defendants, contend that the position of the County, as alleged in this cause of action, is correct.

86. A declaration of the respective rights and obligations of the parties is necessary in order to avoid prejudice to their respective positions and their federally authorized and delegated rights and privileges and the privileges authorized by the adoption of the Airport project by the County, the unnecessary imposition of inappropriate constraints on the air traveling public, and prejudice to those citizens of Orange County which will benefit from implementation of the Airport project.

SIXTH CAUSE OF ACTION
(Injunctive Relief)

87. The plaintiff incorporates by this reference the allegations of paragraphs 1 through 86 of this complaint.

88. If Newport Beach, SPON or AWG initiate separate CEQA state court actions in respect of EIR 508, they may effectively deprive this Court of the ability to enjoin such actions or stay the state court proceedings. The simultaneous prosecution of this action and separate state court CEQA actions would inevitably involve similar issues which

could be considered and adjudicated only imperfectly and incompletely because the issues are inevitably interrelated. In certifying EIR 508 and approving the Airport project, the County was required not only to consider relevant environmental considerations as disclosed by EIR 508, but also relevant legal, social, political and economic considerations inevitably involved in implementation of the Airport project. The lawfulness of the County's actions cannot meaningfully be adjudicated in any action of lesser scope that the scope of controversial issues which were before the County when it made its decisions.

89. If not enjoined, the County is informed and believes that Newport Beach, SPON and AWG will seek to prevent a complete adjudication of all of these related issues, and the issuance by this Court of such temporary and permanent injunctive relief as may be necessary against such defendants is essential to preserve the integrity of this action, the jurisdiction of the Court over the entire controversy, and the rights of all of the parties to a complete adjudication of their disputes. Such action would require a significant duplication of litigation effort and the expenditure of public funds by the County and other parties. No defendant would be harmed by any such orders.

WHEREFORE, PLAINTIFF PRAYS:

1. For a declaration of its rights and the lawfulness of its actions as alleged in the First, Second, Third and Fourth and Fifth Causes of Action;

2. For such injunctive relief as may be necessary as alleged in the Sixth Cause of Action;

3. For its costs of suit; and

4. For such other and further relief as may be deemed necessary or appropriate by the Court.

March 15, 1985

Michael Scott Gatzke
Mark J. Dillon
Gatzke, Lodge & Mispagel

Attorneys For The
County of Orange

By: Michael Scott Gatzke